10

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]191.

ELIZABETH PECK, PETITIONER,

vs.

THE TRIBUNE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 12, 1907.
CERTIORARI AND RETURN FILED NOVEMBER 7, 1907.

(20,883.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 480.

ELIZABETH PECK, PETITIONER,

vs.

THE TRIBUNE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1908.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1906.

No. 1331

ELIZABETH PECK,

Plaintiff in Error,

vs.

THE TRIBUNE COMPANY,

Defendant in Error.

MR. CHARLES CARROLL BARTLETT,
MR. S. C. IRVING,

Counsel for Plaintiff in Error.

MR. JOHN BARTON PAYNE,
MR. FRANK R. CAIN,

Counsel for Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1 Pleas in the Circuit Court of the United States for the Northern District of Illinois—Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division before the Hon. Solomon H. Bethea, District Judge of the United States for the Northern District of Illinois, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand nine hundred and six, being one of the days of the regular December term of said Court, 1905, and of our independence the one hundred and thirtieth year.

MARSHALL E. SAMPSELL,
Clerk.

2 CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois—

Eastern Division.

Elizabeth Peck,
vs.
The Tribune Company, a Corporation. } 28099

Be it remembered that on this day to-wit: the thirty-first day of January, 1906, came Elizabeth Peck by her attorneys, Messrs. Bartlett and Irving and filed in the clerk's office of said Court her certain Praecipe for Summons in words and figures following to-wit:

PRAECIPE FOR SUMMONS.

United States of America,
Northern District of Illinois, } ss.
Eastern Division,

CIRCUIT COURT,

March Term A. D. 1906.

Elizabeth Peck,
Plaintiff
vs.
The Tribune Company, a corporation
Defendant, } In Case.
Damages $25,000.00.

The Clerk of said Court will issue a Summons in said cause to said defendants, in a plea of trespass on the case to the damage of said plaintiff in the sum of twenty five thousand ($25,000.00) dollars direct the same to the United States Marshal for said District to execute and make it returnable to the March Term of said Court, 1906.

3 Dated this 31st day of January A. D. 1906.

BARTLETT & IRVING,
Plaintiff's Attorneys.

To Marshall E. Sampsell, Esq., Clerk.

(Endorsed) Filed January 31, 1906, Marshall E. Sampsell, Clerk.

And on the same day to-wit: the thirty-first day of January, 1906, a certain Summons issued out of the clerk's office of said Court directed to the Marshal of said District to execute, which said Summons together with the Marshal's return thereon endorsed is in the words and figures following to-wit:

4 Circuit Court of the United States of America, } ss.
Northern District of Illinois. }

The United States of America, To the Marshal of the Northern District of Illinois—Greeting:

We Command You to Summon The Tribune Company, a Corporation, if found in your District, to be and appear before our Judges of our Circuit Court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the District aforesaid, on the 1st Monday of March next, to answer unto Elizabeth Peck, of a plea of trespass on the case, to her damage, as is alleged, of Twenty-five thousand ($25,000.00) Dollars, and have you then and there this Writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 31st day of January, in the year of our Lord one thousand nine hundred and six and of our independence the 130th year.

MARSHALL E. SAMPSELL,
(Seal) *Clerk.*

5 MARSHAL'S RETURN.

I have served this writ within my district in the following manner to-wit:

Upon the within named The Tribune Company, a corporation by reading the same to and in the presence and hearing of A. T. Ward cashier of the said company, at the same time delivering to him personally a true copy thereof on the 1st day of February A. D. 1906.

I was unable to find the president or other officer of the said company within my district.

JOHN C. AMES,
U. S. Marshal,
By WM. E. CASS,
Deputy.

(Endorsed) Filed Feb. 1, 1906, Marshall E. Sampsell, Clerk.

And on the same day to-wit: the thirty-first day of January, 1906, came the plaintiff in said entitled cause by her attorneys and filed in the clerk's office of said Court her certain Declaration in words and figures following to-wit:

6 DECLARATION

UNITED STATES CIRCUIT COURT

Northern District of Illinois,

Eastern Division

Elizabeth Peck, *Pltf.*
vs.
The Tribune Company, a corporation, *Deft.*
} Trespass on the Case

Declaration.

And now comes Elizabeth Peck, who is a citizen of the State of Iowa, residing at Mount Auburn, in said State, by Bartlett & Irving, her attorneys and complains of the defendant, The Tribune Company, a corporation, organized under the laws of the State of Illinois, and is a citizen of said State and resides and has its principal office and place of business in Chicago, in the Northern Division of the Northern District of Illinois of an action of trespass on the case for a claim involving over Two Thousand Dollars, exclusive of interest and costs:

For That Whereas, plaintiff before and at the time of committing, by the defendant, of the several grievances hereinafter mentioned was a person of good name, credit, reputation and respectability and deservedly enjoyed the esteem and good opinion of her neighbors and other worthy citizens of her State and Country; yet the defendant well knowing the premises, but wickedly and maliciously intending to injure the plaintiff and to bring her into public scandal, infamy and disgrace, on or about the 22nd day of October, A. D. 1905 in the City of Chicago, County of Cook and State of Illinois, wickedly and maliciously did compose, print and publish and cause to be composed, printed and published of and concerning the

plaintiff in a certain newspaper, called the Chicago Sunday Tribune, a certain false, scandalous, malicious and defamatory libel, the same being in words and figures following:—

7 "NURSE AND PATIENTS PRAISE DUFFY'S.

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of Duffy's Pure Malt Whiskey.

"For that weak, run-down and gone feeling, it is the best tonic and stimulent in the world."

(At this point in said libed was printed and published a true and correct likeness of plaintiff with the name Mrs. A. Schuman below it)

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run-down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that gone feeling, and once that Duffy's is within their reach it is used always."—Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey.

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down weakened diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and it is the only whiskey recognized by the Government as a medicine.

There is but one Duffy's Pure Malt Whiskey. Insist on having the genuine and refuse cheap substitutes and imitations offered by unscrupulous dealers, which are placed on the mar-

ket for profit only which are positively harmful to both body and brain, Look for the trade-mark, the "Old Chemist" on the label, and be sure the seal on the bottle is unbroken. Sold in sealed bottle only; Never in Bulk.

(Trade-Mark)

All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free.

Duffy's Malt Whiskey Co., Rochester, N. Y."

8 A copy of said publication is hereto attached and made a part of this declaration.

And plaintiff states that as part of said publication and following the words, "For that weak, run-down and gone feeling it is the best tonic and stimulant in the world" was printed and published the picture or likeness of the plaintiff: That said picture or likeness was printed and published by the defendant as being the picture or likeness of one Mrs. A. Schuman, which name was printed below said picture, but plaintiff states that said picture then and there printed and published by the defendant as being the likeness of Mrs. A. Schuhan was and is a true and correct picture of the plaintiff and not the picture of Mrs. A. Schuman, as is alleged in said publication.

And plaintiff states that she is not "One of Chicago's Most Capable and Experienced Nurses" neither has she, the plainttiff, ever used or recommended Duffy's Pure Malt Whiskey or caused to be used or recommended said whiskey to the public as is alleged concerning plaintiff in said publication

Plaintiff further states that the allegation in said publication that she does use and has used and does recommend and has recommended the use of said whiskey is false, malicious, scandalous and defamatory: That she is and always has been a non-user and abstainer from whiskey and all spirituous liquors: That the allegation in said publication so charging the plaintiff with the use of whiskey and recommending its use to the public has been and is greatly humiliating to the plaintiff; and that said publication has brought the plaintiff and her family into contempy and ridicule before the world.

Plaintiff Further states that the publication of the plaintiff's likeness by said defendant was without war-

9 rant, right, leave or license and wholly unknown to plaintiff and contrary to the wishes and desires of the plaintiff.

By means of the committing of which, said grievances then and there committed by the defendant upon and against the plaintiff, she the plaintiff, has been and is greatly injured in her said good name, credit, feelings, business and reputation and has thereby been brought into public scandal, infamy and disgrace and has been slighted, shunned and avoided by divers persons; and has been and is injured in her business and social standing and future prospects in life to her damage of $25,000.00 and therefore she brings her suit.

And the defendant, The Tribune Company, further contriving to injure the plaintiff heretofore, to-wit, on October 22, A. D. 1905 published in the Chicago Sunday Tribune, a newspaper of large circulation, the picture of plaintiff as the picture of one Mrs. A. Schuman, in connection with a whiskey advertisement and alleged testimonial of one Mrs. A. Schuman, to the merits of a certain brand or manufacture of whiskey; And plaintiff says that the statements then and there printed and published by the defendant of and concerning the plaintiff were and are false, scandalous, malicious and defamatory as the defendant then and there well knew; That he picture then and there printed and published by the defendant as the picture of Mrs. A. Schuman is not the picture of Mrs. A. Schuman, as is alleged in said publication, but is the picture of the plaintiff; and that she has been recognized by numerous persons from said picture: And plaintiff states that the effect and meaning of said publication are to charge plaintiff with the use of whiskey and to publish the same to the world, and to allege and publish of and concerning the plaintiff, that she, the plaintiff, has used Duffy's Malt Whiskey constantly for years and to proclaim to the world that plaintiff has been and is a nurse and has and does recommend the use of whiskey to the public.

And plaintiff states that said publication is as to the plaintiff wholly false and libelous: That said publication is malicious and tends to and does bring the plaintiff into ridicule and contempt before the world and especially with her friends and acquaintances who know that plaintiff has never been a nurse, as is alleged in said publication. By means of the committing of which said grievances then and there committed by the defendant upon and against the plaintiff, she the plaintiff has been and is greatly injured in her good name credit, feeling and reputation, and has suffered great mental pain and anguish and has thereby been brought into public

scandal, infamy and disgrace, and has been injured in her social standing and future prospects in life to her damage of $25,000.00 and therefore she brings her suit.

And For That Whereas, plaintiff, before and at the time of the committing, by the defendant, of the several grievances hereinafter mentioned was a person of good name, credit, reputation and respectability, living in the peace and quiet of her home and enjoying the happiness of a domestic life and then and there had the right of privacy and to be let alone in the enjoyment of her peace and quiet and to live unmolested and undisturbed by the defendant in the enjoyment of her said privacy, yet the defendant not regarding its duty in this behalf invaded plaintiff's said right of privacy and published plaintiff's picture in its issue of October 22, A. D. 1905 as a part of an advertisement containing an alleged testimonial of one, Mrs. A. Schuman to the virtues of Duffy's Pure Malt Whiskey.

11 And plaintiff states that by the defendant's wrongful act in so publishing plaintiff's picture in connection with said advertisement, she, the plaintiff, has been greatly distressed and humiliated and has suffered great annoyance, pain, mental anguish and humiliation and has thereby been made the subject of scorn, ridicule and contempt on the part of her neighbors and acquaintanes, and has been held up to the scorn, contempt and ridicule of the world; and that said publication of plaintiff's picture was wholly without warrant, right, leave or license and contrary to the wishes and desires of plaintiff.

By means of the committing of which, said grievances then and there committed by the defendant upon and against the plaintiff, she the plaintiff, has been and is greatly injured in her said good name, credit, feelings, business and reputation and has thereby been brought into public scandal, infamy and disgrace and has been slighted, shunned and avoided by divers persons; and has been and is injured in her business and social standing and future prospects in life to her damage of $25,000.00 and therefore she brings her suit.

BARTLETT & IRVING
Attorneys for Plaintiff.

Nurse and Patients Praise Duffy's

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of DUFFY'S PURE MALT WHISKEY.

"For that weak, run-down and gone feeling, it is the best tonic and stimulant in the world."

MRS. A. SCHUMAN.

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it, as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling,' and once that Duffy's is within their reach it is used always."—**Mrs. A. Schuman**, 1676 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to the medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down, weakened, diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and is the only whiskey recognized by the government as medicine.

There is but one Duffy's Pure Malt Whiskey. Insist on having the genuine and refuse cheap substitutes and imitations offered by unscrupulous dealers, which are placed on the market for profit only and which are positively harmful to both body and brain. Look for the trade-mark, the "Old Chemist," on the label, and be sure the seal on the bottle is unbroken. Sold in sealed bottles only; never in bulk.

All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free. Duffy's Malt Whiskey Co., Rochester, N. Y.

(Endorsed) Filed Jan., 31, 1906, Marshall E. Sampsell, Clerk.

13 And on to-wit: the twentieth day of February, 1906, came the defendant in said entitled cause by its attorney Mr. A. S. Trude and filed in the clerk's office of said Court its certain Demurrer in words and figures following to-wit:

DEMURRER.

UNITED STATES CIRCUIT COURT,

Northern District of Illinois,

Northern Division.

Elizabeth Peck, *Pltf.*
vs.
The Tribune Company, A Corporation *deft.*
} Trespass on the case. 28099—5633

And the defendant, by A. S. Trude, its attorney, comes and defends, etc., when, etc and says, that the said declaration and each count thereof, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain her aforesaid action, and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining her aforesaid action, etc.

A. S. TRUDE,
Atty., for Defendant.

(Endorsed) Filed Feb., 20, 1906, Marshall E. Sampsell, Clerk.

14 And on to-wit: the nineteenth day of March, 1906, being one of the days of the regular December term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

ORDER OF MARCH 19, 1906.

Elizabeth Peck,
vs.
The Tribune Company, } 28099

Now come the parties by their attorneys and thereupon the demurrer to the declaration herein is withdrawn and the defendant has ten days to further plead; and thereupon leave is given Mr. Frank R. Cain and Mr. John Barton Payne to enter their appearance as general counsel for said defendant.

15 And afterwards to-wit: on the twenty-sixth day of March, 1906, came the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Plea in words and figures following to-wit:

PLEA.

United States of America,
Northern District of Illinois, } ss.
Eastern Division,

IN THE CIRCUIT COURT OF THE UNITED STATES,

Within and for said District and Division.

Elizabeth Peck,
vs.
Tribune Company.

And the defendant by A. S. Trude and John Barton Payne, its attorneys, comes and defends the wrong and injury when etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it; and of this the defendant puts itself upon the country, etc.

A. S. TRUDE,
JOHN BARTON PAYNE,
Attys., for deft.

(Endorsed) Filed March 26, 1906, Marshall E. Sampsell, Clerk.

16 And on to-wit: the fourteenth day of May, 1906, being one of the days of the regular December term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

ORDER OF MAY 14, 1906.

Called for Trial and Jury Sworn.

Elizabeth Peck,
vs. } 28099
The Tribune Company,

This cause being called for trial now come the parties by their attorneys, and come also the following jury, to-wit: E. J. Gotsch, R. L. Straug, John Fanning, William Pohl, Hugh Gair, H. L. Wessling, Adam Glos, H. D. Gray, John Lies, C. E. Drew, R. S. Wilson and Isaac Anderson, who were all duly elected, tried and sworn to well and truly try said issue and a true verdict render according to the law and the evidence; and the opening statements of counsel being heard, together with the evidence in part for the plaintiff, the further trial of this cause is postponed until tomorrow morning.

17 And on to-wit: the fifteenth day of May, 1906, being one of the days of the regular December term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

JUDGMENT OF MAY 15, 1906.

Elizabeth Peck,
vs. } 28099
The Tribune Company,

Now come the parties by their attorneys and come also said jury and the trial of this cause is resumed; and the evidence in chief for the plaintiff being heard and concluded, the defendant enters its motion to have said jury instructed to return a verdict for said defendant and the Court having heard arguments upon said motion and being now fully advised in the premises, sustains said motion; and thereupon said jury, under the instructions of the Court, return their

verdict finding the defendant not guilty, to the entry of which verdict the plaintiff excepts and enters her motion for a new trial, which the Court overrules, the plaintiff further excepting and enters her motion in arrest of judgment, which is also overruled, the plaintiff again excepting. Judg Ma

It is thereupon Considered and Adjudged by the Court that the plaintiff take nothing by her said declaration; and that the defendant be and it is hereby forever discsharged and go hence without day and that it recover of the plaintiff its costs herein to be taxed; and that execution issue therefor, to the entry of which judgment the plaintiff excepts.

18 And on to-wit: the twenty-seventh day of June, 1906, being one of the days of the regular December term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit: Orde Ju

ORDER OF JUNE 27, 1906.

Time Extended for Filing Bill of Exceptions.

Elizabeth Peck,
vs.
The Tribune Company, } 28099

Upon motion of the plaintiff's attorney and upon notice to the defendant's counsel, and upon consent of the parties herein, the time to file the bill of exceptions is extended to July 16th, 1906.

19 And on to-wit: the sixteenth day of July, being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit: Ord Ju

ORDER OF JULY 16, 1906.

Extending Time to File Bill of Exceptions.

Elizabeth Peck,
vs.
The Tribune Company, } 28099

On motion of the plaintiff's attorney and upon notice to the defendant's counsel, It is Ordered that the time for the plaintiff to present her bill of exceptions herein be, and the same is hereby extended ten days from this date.

20 And on to-wit: the twenty-sixth day of July, 1906, came the plaintiff in said entitled cause by her attorneys and filed in the clerk's office of said Court her certain Bill of Exceptions in words and figures following to-wit:

21 BILL OF EXCEPTIONS

IN THE CIRCUIT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division.

Elizabeth Peck, *Plaintiff,*
vs.
The Tribune Company, a corporation, *Defendant.*
} No. 28099 Adjourned April Term.

Bill of Exceptions.

Be it remembered that heretofore, to-wit, on the 14th day of May, A. D. 1906, being one of the days of said term of said Court, before his Honor, Sol. H. Bethea, one of the judges of said Court, sitting on the common law side thereof, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

The plaintiff in said cause to maintain the issues upon her part introduced the following evidence and the following proceedings were had and objections and exceptions made and taken, at the time of said trial as are hereinafter noted.

The plaintiff, MRS. ELIZABETH PECK, being first sworn testified in her own behalf as follows:

"I live at Mount Auburn, Iowa and have lived there for three years, previous to that time I lived in Englewood in the City of Chicago. Lived in Chicago fourteen or fifteen years. My husband was a printer and had an office at 16 Randolph Street. I also was a printer before I was mar-
22 ried. My husband was in business in Randolph Street fourteen years, published the American Railroader."

Plaintiff is shown a paper and asked if she has seen the picture.

Answers "I have."

Testimony of Mrs. Peck

Q. "Will you state the circumstances under which you saw it?"

Answers "yes."

Objected to and objection sustained. To which ruling of the Court plaintiff, by her counsel, excepted.

Plaintiff is again asked what called her attention to the picture.

Objected to and objection sustained. Exception by the plaintiff.

Plaintiff is asked whether or not she recognized the picture when she saw it.

Answers "I did, immediately."

Q. "Whose picture did you recognize it to be, Mrs. Peck."

Ans. "I recognized it to be myself and Mark."

Q. "Your son, Mark."

Ans. "Yes." This was in October of last year, 1905.

Mr. Bartlett; counsel for plaintiff; "May it please the Court, we have agreed with counsel that the paper containing the article may be admitted in evidence."

The Court; "All right."

Counsel for plaintiff; "As a publication of the defendant."

The Court; "Put it in."

Counsel for plaintiff offers now the paper containing the article in evidence and asks that it may be marked "plaintiff's exhibit A"

23 Mr. Payne, counsel for defendant, "Well, you don't state it just right, it may mean the same thing. We admit the publication; that is what counsel meant to say."

Counsel for plaintiff, "It is the publication of the article declared upon, is that right?"

Counsel for defendant, "Yes." I wish to object to the introduction of the article in evidence, and will either argue it now or at such time as the Court may desire."

The Court: "Well, let him go on as far as he can and argue it all at once."

Mr. Payne, counsel for defendant, "All right."

Counsel for plaintiff "We offer the paper in evidence."

The Court: "Let it go in subject to objection; ruling reserved."

Whereupon the paper referred to was admitted in evidence and marked as "plaintiff's exhibit A" and is in the following words and figures to-wit.

PLFF EX. A

Nurse and Patients Praise Duffy's

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of DUFFY'S PURE MALT WHISKEY.

"For that weak, run-down and gone feeling, it is the best tonic and stimulant in the world."

MRS. A. SCHUMAN.

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling,' and once that Duffy's is within their reach it is used always."—**Mrs. A. Schuman**, 1076 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to the medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down, weakened, diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and is the only whiskey recognized by the government as medicine.

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All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free. Duffy's Malt Whiskey Co., Rochester, N. Y.

(Endorsed) Circuit Court of the United States, Northern District of Illinois—Eastern Division, Filed July 25, 1906, as of May 15, 1906. Marshall E. Sampsell, Clerk.

Exhibi
Phot

27½ PLFTS' EX. B.

(Endorsed) Filed July 25, 09 as of May 15/06, Marshall E. Sampsell, Clerk.

The article having been read to the Jury, plaintiff was asked the question, "Mrs. Peck, the article read in evidence states that you are a nurse, is that true?"

Question objected to and objection sustained. To which ruling of the Court the plaintiff, by her counsel, then and there duly excepted.

Plaintiff was asked the question whether or not it was true that she was accustomed to the use of Duffy's Pure Malt Whiskey.

Defendant objected to the question. The Court sustained the objection. To which ruling of the Court, plaintiff, by her counsel then and there duly excepted.

The Court "It don't state that, it states that Mrs. A. Schuman is a nurse"

Mr. Irving, "The Court understands our position, that 24 by the publication of the plaintiff's picture—

The Court, "You are not counting upon the writing, the printed matter in the advertisement, you are counting upon the picture."

Mr. Irving, "We are counting upon the entire article, that the article, by printing her picture, refers to her."

The Court, "No, it don't; It don't say whose picture it is."

Mr. Irving, "We allege that the article was published of and concerning her."

The Court, "Well objection sustained, go on."

To which ruling of the Court plaintiff, by her counsel then and there duly excepted.

Plaintiff continuing says, "I have kept house and sewed at my home in Mount Auburn, Iowa. Have two sons, Millard and Mark. Am a member of the Christian Church. Was baptized into that Church when I was twelve years old. I have an interest in the place I own. Have never had any business with Duffy Pure Malt Whiskey Company of Rochester, N. Y. Never sent a picture of myself or my son Mark to the Duffy Pure Malt Whiskey people. Have had communication with the whiskey people after I found this picture. I wrote them after that. About a week afterwards. I can't just tell when it was. It was, I think, along in October of last year, 1905. I have no copy of the letter, didn't keep any copy. We have about an acre of ground with a house on it. My son, Mark, is ten years old and my son, Millard, thirteen

years old. I never lived at 1576 Mozart Street, this City.
25 Never heard of Mrs. A. Schuman, until this trouble came up with the picture. My husband is dead. I do sewing and go out for hire."

Plaintiff is asked the question, "Well, you were in business in Chicago, were you not?"

Ans. Yes sir.

Counsel for defendant, "Wait a minute, I object."

Court sustained objection. To which ruling of the Court plaintiff, by her counsel, then and there duly excepted.

Cross-Examination.

"I don't just remember the date when I wrote to the Duffy Malt Whiskey Company, but it was the next evening after I found the picture. Didn't keep a copy of my letter. Letter came from them to my lawyers, enclosing copy of affidavit of Mrs. Schuman and the circumstances under which publication occurred. My lawyers have the letter. It was before suit." (Counsel for plaintiff produced the letter.) "Can't just exactly remember how long after the 22nd of October I saw the paper. I don't remember how I got the paper, but I do know how I got the picture. I saw the newspaper containing the advertisement in Mount Auburn. Can't remember just where. I remember the first I saw of the pictures. My sister called my attention to it, the picture and the advertisement. My sister sent it to me. My sister lives at Chicago, she did at that time. My sister did not cut the picture out she mailed me the paper. The first I knew of this picture it was brought to me cut out with the ad. Miss Amy See, a cousin of mine, brought it. She lives at Mount Auburn, Iowa, with me. Cannot say just how long
26 that was after the 22nd of October. Do not think it was a week after that time. My sister mailed me this identical paper, marked plaintiff's exhibit A. It could not have been a week after the 22nd of October, I think. Population of Mt. Auburn is about 300. It is in Benton County, Iowa on the Rock Island Railroad. I have lived there for three years. Was elected President of the Ladies' Aid Society in the Christion Church in the month of January, 1906 and am now the president of the Woman's Aid Society in that Church. The Christian Church is one of the principal churches in Mount Auburn. I was born in Benton County, Iowa, within a mile

and a half from where I live. Have not lived there all my life, but was back and forth since I was thirteen or fourteen years old. It has been my principal abiding place except when I lived in Chicago."

Witness is shown a letter dated Nov. 6, 1905, addressed to Messrs. Bartlett & Irving, signed by Duffy Malt Whiskey Company, containing the affidavit of Mrs. Schuman and is asked if that is the communication referred to. Handing paper to witness. Witness answers yes.

Q. You know, of course, Mrs. Peck, that so far as the Tribune was concerned the publication of your picture, if it was your picture, was a mistake, that they had no knowledge whatever of the fact that it was your picture."

Counsel for plaintiff objects to the question. Court overruled the objection. To which ruling of the Court the plaintiff, by her counsel, then and there duly excepted.

27 Q. "Now before you brought this suit you had this affidavit in your possession, did you not?"

Counsel for plaintiff objected to the question. Objection overruled. To which ruling of the Court plaintiff, by her counsel, then and there duly excepted.

Ans. "Did not see this letter before suit was brought.

Q. Were Bartlett & Irving your attorneys on the 6th day of November, 1905?

Counsel for plaintiff objects to the question. Objection overruled. To which ruling of the Court plaintiff by her counsel, then and there duly excepted.

"I have no other attorneys except Bartlett & Irving. Did not tell the Duffy Malt Whiskey people to write to Bartlett & Irving. My sister took this matter to them through me. The whole matter was conducted by my sister.

Re-direct Examination.

Plaintiff is handed a small object and asked to look at it. Witness takes the object and says that it is a photograph of herself and her son Mark. It was made at La Porte, Iowa. I do not recall the photographer's name. It was made for me. It was made the Saturday before Easter, two years ago, that will be 1904. Photograph of plaintiff and her son offered in evidence, counsel for plaintiff stating that the picture offered in evidence is the picture of the plaintiff and that it is the picture in the Tribune. The same picture only

enlarged. That the picture in the Tribune was made from the same plate as the one offered in evidence. That it was made from a picture like it.

Whereupon paper (picture) referred to was admitted in evidence and marked "plaintiff's exhibit B"

28 Plaintiff is then handed a plate and asked if she recognizes it. Answers "I do". Plaintiff continuing says it is a picture of myself and Mark and my son Millard taken on one plate. The name of the man who made this plate is gone from me. It was made by the same person that made the picture, plaintiff's exhibit B, and at the same time.

Whereupon plate referred to was admitted in evidence and marked "plaintiff's exhibit C".

Q. "Mrs. Peck you say that the picture was first called to your attention by Miss Amy See in your cross examination?" Answers yes.

Q. "Do you remember when that was?"

Question objected to. Court sustains objection. To which ruling of the Court plaintiff, by her counsel, then and there duly excepted.

The name of my sister that had the correspondence with me with reference to the picture is Cad Barnet. She then lived out on Walnut Street in Chicago. I wrote to the Duffy people before I had heard from my sister Cad. I wrote to my sister to see what could be done about it. I don't just remember what time.

Re-cross Examination.

The picture, marked "plaintiff's exhibit B," has been continuously in my possession until I sent it with the plate to my sister. That was shortly after I wrot to the Duffy people in October. I got the plate from the photographer. It was in his possession. I got the plate shortly after the picture came out in the paper. I think it was in October or November 1905. Photographer lives in La Porte, Iowa. This town is nine miles North of Mount Auburn in Blackhawk County and has perhaps 2000 inhabitants.

29 MARK PECK called as a witness in behalf of the plaintiff, being first duly sworn testified as follows:

"My name is Mark Peck. Am a son of Mrs. Elizabeth Peck. Live at Mount Auburn, Iowa. Have lived there over three years. Before that lived in Chicago."

Is handed paper and asked if he has seen the picture there before.

Answers yes I saw it at school.

Q. "Who called your attention to it"

Question objected to. Court sustains the objection. To which ruling of the Court plaintiff, by her counsel, then and there duly excepted.

Q. "State if you know whose picture it is."

Answer "It is my mother and me. Do not know how it came to be in the paper. Never gave permission or consent to have it printed there.

ELIZABETH PECK, the plaintiff, being recalled for further direct examination testified as follows:—

"There were two of those small pictures. It came to my notice in the paper this way; by cousin, Amy See, went to school and there was a young lady—her mother told her to pin a picture back of the seat and she found this picture and called others attention to it and they said it was me and she took it to school and called my cousin, and asked her if she knew who this picture was and she said "Yes, that is Mrs. Peck and Mark". They called the boys and recognized it and they brought it home to me and I wrote to the Duffy people enclosing one of these pictures and asked them what authority they had for using my picture as an advertisement for their whiskey."

MRS. PETERSON being called as a witness on behalf of the plaintiff and being first duly sworn testified as follows:— Test. Mc

30 "My name is Mattie Peterson, live at 530 Tremont Ave. out in Englewood. Have lived here 37 years. I know Mrs. Elizabeth Peck. Have known her for 12 years. She lived next door. I know her family and her children, Millard and Mark. I know them all."

Is handed the paper containing the advertisement and asked if she has seen it before. Answers yes, I saw it in October of last year. I saw it at home in the paper, in the Tribune. I recognized that picture in the advertisement to be Mrs. Peck and Mark.

Q. "What effect or impression did it give you at the time you saw this picture in the paper?"

Question objected to Court sustains the objection. To which ruling of the Court plaintiff, by her counsel then and there duly excepted.

J. L. McCOLLUM, being called as a witness on behalf of the plaintiff and being first duly sworn testified as follows: Test. J.

"My name is J. L. McCollum. I live at 630 West Lake Street, Chicago. Am a physician and surgeon. Have lived here since 1891. I know Mrs. Elizabeth Peck, the plaintiff and her son Mark."

Is handed paper, plaintiff's exhibit A, and is asked if he has ever seen this paper or a copy of it before. Answers "I have, in the latter part of October of last year. I recognize the picture published in the advertisement to be Mrs. Peck and her son Mark."

Cross-Examination.

"Have known them nine or ten years. Have been their family physician."

By agreement of counsel certain matters were ad-
31 mitted in evidence. First that the Tribune on the 22nd day of October, 1905 circulated in Iowa, Wisconsin, Illinois and Indiana. That its circulation on that date was 150,000 at least and that the Tribune is worth from $500,000 to $1,000,000

Whereupon counsel for defendant asked the Court to instruct the jury to find for the defendant and the Court thereupon gave the jury the following instruction: "The Court instructs the jury to find the defendant not guilty" to the giving of this instruction plaintiff, by her counsel then and there duly excepted.

32 And Thereupon the Jury returned a verdict against the plaintiff; whereupon the plaintiff, by her counsel, then and there moved the Court to set aside the verdict so rendered, and grant a new trial of this cause.

But the Court denied the motion, and gave judgment on the verdict against the plaintiff; to which decision of the Court, in denying such motion and rendering judgment, the plaintiff, by her counsel, then and there excepted.

And thereupon, the plaintiff, by her counsel, then and there moved the Court in arrest of judgment, but the Court overruled the motion; to which decision of the Court in overruling said motion, the plaintiff, by her counsel, then and there duly excepted.

And Forasmuch as the matters above set forth do not fully appear of record, the plaintiff tenders this her Bill of Exceptions, and prays that the same may be signed and sealed by the Judge of this Court, pursuant to the statute in such case made; which is done accordingly this 26th day of July A. D. 1906.

SOLOMON H. BETHEA (Seal)
Judge of the United States District Court, Northern District, Eastern Division.

O. K.
JOHN BARTON PAYNE
FRANK R. CAIN
Attys for deft

(Endorsed) Filed July 26, 1906 Marshall E. Sampsell, Clerk.

33 And on to-wit: the twenty-sixth day of July, 1906, came the plaintiff in said entitled cause by her attorneys and filed in the clerk's office of said Court her certain Petition for Writ of error in words and figures following to-wit:

34 PETITION FOR WRIT OF ERROR.

IN THE CIRCUIT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division.

Elizabeth Peck,
Plaintiff,
vs.
The Tribune Company, a corporation,
Defendant.
No. 28099

Petition for Writ of Error.

And now comes the above named plaintiff, Elizabeth Peck, by Bartlett & Irving, her attorneys, and says that on or about the 15th day of May A. D. 1906 this Court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and proceedings had prior there unto in this cause certain errors were committed to the prejudice of this defendant all of which will more fully appear in detail from the Assignment of Errors, which is filed with this petition.

Wherefore this plaintiff prays that the writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of errors so complained of and that the transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals and that the same may be in and by said Court inspected, reviewed and considered and thereupon the errors aforesaid, may be corrected as justice may require and that the said judgment may be reversed.

BARTLETT & IRVING,
Attorneys for Plaintiff.

Let Writ of Error issue,

S. H. BETHEA.

(Endorsed) Filed July 26, 1906, Marshall E. Sampsell, Clerk.

35 And on the same day to-wit: the twenty-sixth day of July, 1906, came the plaintiff in said entitled cause by her attorneys and filed in the clerk's office of said Court her certain Assignment of Errors in words and figures following to-wit:

36 ## ASSIGNMENT OF ERRORS.

IN THE CIRCUIT COURT OF THE UNITED STATES.

Northern District of Illinois.

Eastern Division.

Elizabeth Peck, *Plaintiff,*
vs.
The Tribune Company, a corporation, *Defendant.* } No. 28099.

Assignment of Errors.

And now comes the plaintiff, Elizabeth Peck, by Bartlett & Irving, her attorneys, and says that in the record and proceedings in the above and foregoing cause, and in the rendering of the judgment therein, there is manifest error in this, to wit:

(1) The Court erred in refusing to admit proper evidence on behalf of the plaintiff, as follows: The witness, Elizabeth Peck, who testified in her own behalf, was asked the following questions:

Q "Will you state the circumstances under which you saw it (the article declared upon)?"

Objection by defendant. Court sustains the objection. Exception by plaintiff.

Q "What called it to your attention?"

Objection by defendant. Court sustains objection. Exception by plaintiff.

Q "Mrs. Peck, the article read in evidence states that you are a nurse. Is that true?"

37 Objection by defendant. Court sustains objection. Exception by plaintiff.

Q "The article read in evidence states that you have been accustomed to the use of Duffy's Pure Malt Whiskey. I will ask you whether or not that is true."

Objection by defendant. Court sustains objection. Exception by plaintiff.

Counsel for Plaintiff: "The Court understands our position that by the publication of the plaintiff's picture—"

The Court: "You are not counting upon the writing, the printed matter in the advertisement; you are counting upon the picture."

Counsel for Plaintiff: "We are counting upon the entire article; that the article, by printing her picture, refers to her."

The Court: "No, it don't. It don't say whose picture it is."

Counsel for Plaintiff: "We allege that the article was published of and concerning her—"

The Court: "Well, objection sustained. Go on."

Counsel for Plaintiff "Exception."

(2) Upon cross-examination, the witness, Mrs. Peck, was asked the following question by counsel for defendant:

Q "You know, of course, Mrs. Peck, that, so far as the Tribune Company was concerned, the publication of your picture, if it was your picture, was a mistake; that they had no knowledge whatever of the fact that it was your picture?"

38 Objection by plaintiff. Objection over-ruled. Exception by plaintiff.

(3) The Witness, Mark Peck, who testified on behalf of the plaintiff, was asked the following question:

Q "Who called your attention to it (the picture)?"

Objected to as immaterial. The Court sustained the objection. Exception by plaintiff.

(4) The witness, Mrs. Peterson, who testified on behalf of the plaintiff, was asked the following question:

Q "What effect or impression did it give you at the time you saw this picture in the paper?"

Question objected to as incompetent. Objection sustained. Exception by the plaintiff.

(5) The Court erred in its conclusions of law.

(6) The Court erred in giving the following instruction to the jury: "The Court instructs the jury to find the defendant not guilty."

(7) The verdict was contrary to the law and the evidence. Wherefore, plaintiff respectfully represents that for errors herein assigned the judgment entered in said cause should be set aside, reversed and held of no force or effect, and the cause remanded for a new trial.

BARTLETT & IRVING .
Attorneys for Plaintiff.

(Endorsed) Filed July 26, 1906 Marshall E. Sampsell, Clerk.

41 And on the same day to-wit: the twenty-sixth day of July being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

ORDER OF JULY 26, 1906,

Allowing Writ of Error.

Elizabeth Peck,
vs.
The Tribune Company, a Corporation, } 28099

On motion of the plaintiff's attorney and upon filing petition for writ of error, assignment of errors and bond on writ of error It is Ordered that the petition of plaintiff be allowed and that a writ of error issue to have reviewed in the United States Circuit Court of Appeals for the Seventh Circuit the judgment heretofore entered herein against the plaintiff, and that a citation issue returnable within thirty days.

45 United States of America, } ss:

Writ issued 190

The President of the United States, To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Elizabeth Peck, Plaintiff, vs. The Tribune Company, Defendant. a manifest error hath happened, to the great damage of the said Elizabeth Peck, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of July, in the year of our Lord one thousand nine hundred and six

MARSHALL E. SAMPSELL

(Seal) *Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.*

Allowed by
S. H. BETHEA

Judge.

Northern District of Illinois, } ss:

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 24th day of September A. D. 1906.

MARSHALL E. SAMPSELL
(Seal) *Clerk United States Circuit Court, Northern District of Illinois.*

(Endorsed) Writ of Error. Filed July 26, 1906 Marshall E. Sampsell Clerk

39 And on to-wit: the twenty-sixth day of July, 1906, there was filed in the clerk's office of said Court a certain Bond on Writ of Error in words and figures following to-wit:

40 Know all Men by these Presents, That we, Elizabeth Peck, as principal, and Fidelity Deposite Company of Maryland, as sureties, are held and firmly bound unto The Tribune Company, in the full and just sum of Three hundred dollars ($300.00) to be paid to the said Tribune Company, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this Tenth day of July in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between Elizabeth Peck, plaintiff, and The Tribune Company, defendant a judgment was rendered against the said Elizabeth Peck for costs in said cause, and the said Elizabeth Peck, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Tribune Company, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Elizabeth Peck shall prosecute her writ to effect, and shall answer all damages and costs that may be awarded against her if she fails to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue. Bond, error, July

ELIZABETH PECK, (Seal)
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, (Seal)
By ARTHUR C. ARNOLD, (Seal)
Agent and Attorney in fact.

Sealed and delivered in presence of—
Witness:
H. J. LAMB,

.....

Approved by—
S. H. BETHEA,

.....

.....

(Endorsed) Filed July 26, 1906, Marshall E. Sampsell, Clerk.

42 PRAECIPE FOR RECORD. Praecipe, record, July

CIRCUIT COURT OF THE UNITED STATES,

For the Northern District of Illinois

Eastern Division.

Elizabeth Peck,
vs. } 28099
The Tribune Company,

To the Clerk of the above entitled Court:—

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, nuder the writ of error heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file to-wit:

Praecipe for Summons filed Jan., 21, 1906,
Summons and return thereon endorsed.
Declaration filed Jan., 21, 1906,
Demurrer filed Feb., 20, 1906.
Order of March 19, 1906.

Plea filed March 26, 1906.
Orders of May 14, & 15, 1906.
Orders of June 27, 1906 & July 16, 1906,
Bill of Exceptions filed July 26, 1906,
Petition for Writ of Error filed July 26, 1906,
Assignment of Errors filed July 26, 1906,
Bond on Writ of Error filed July 26, 1906,
Order of July 26, 1906, allowing Writ of Error.

BARTLETT & IRVING
Attorneys for Plaintiff in Error.

(Endorsed) Filed July 26, 1906. Marshall E. Sampsell, Clerk.

43 And afterwards to-wit: on the twenty-fourth day of August being one of the days of the regular July term of said Court, 1906, in the record of proceedings thereof in said entitled cause before the Hon. S. H. Bethea, District Judge, appears the following entry to-wit:

ORDER OF AUGUST 24, 1906,

Extending Time to File Transcript of Record.

Elizabeth Peck,
vs. } 28099
The Tribune Company,

On motion of the plaintiff it is Ordered by the Court, that the time to file transcript of Record in the United States Circuit Court of Appeals, be and the same is hereby extended thirty days.

44 Northern District of Illinois, } ss.
Eastern Division,

I. Marshall E. Sampsell, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court, made in accordance with Praecipe filed in the cause entitled

Elizabeth Peck, Complainant vs. The Tribune Company, Defendant, General No. 28,099, as the same appear from the original records and files of said Court now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, in said District, this 24th day of September, 1906.

MARSHALL E. SAMPSELL
Clerk.

(Seal)

46 United States of America, } ss.

The President of the United States, To The Tribune Company, a corporation. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, wherein Elizabeth Peck is the Plaintiff in error, and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Solomon H. Bethea, Judge of the District Court of the United States, this 26th day of July, in the year of our Lord one thousand nine hundred and six.

SOLOMON H. BETHEA
D. J.

Aug 3—1906

Service of the above writ waived by the defendant and notice received.

TRIBUNE COMPANY
by JOHN BARTON PAYNE
& FRANK R. CAIN
its Attorneys

(Endorsed) Citation. Filed Aug 3—1906 Marshall E. Sampsell, Clerk.

Filed 06.

No. 1331.

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Elizabeth Peck, *plaintiff,*
vs.
The Tribune Company, a corporation, *defendant.* } 28099.

STIPULATION.

It is hereby stipulated and agreed by counsel herein that the clerk in making up the transcript of record in the Circuit Court of Appeals shall print of "Plaintiff's Exhibit A" only so much of said exhibit as the article declared upon in plaintiff's declaration, namely, the entire advertisement headed and entitled "Nurse and Patients Praise Duffy's."

BARTLETT & IRVING
Attorneys for Plaintiff.
JOHN BARTON PAYNE
& FRANK R. CAIN
Attorneys for Defendant.

(Endorsed) 1331 Filed Oct 16 1906 Edward M. Holloway, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 34, inclusive, contain a true copy of the printed record filed in this court of November 30, 1906, which was prepared for the printer, indexed, supervised and distributed by me in accordance with the rules of this court and upon which the cause was heard and determined by the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Elizabeth Peck vs. The Tribune Company, No. 1331, October Term, 1906, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirtieth day of September, A. D. 1907.

EDWARD M. HOLLOWAY,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the city of Chicago in said Seventh Circuit, on the third day of October, 1905, of the October term in the year of our Lord one thousand nine hundred and five and of our Independence the one hundred and thirtieth.

And afterwards, to-wit: On the twenty-fourth day of September, 1906, in the October term last aforesaid, came the plaintiff in error, by her counsel Mr. Charles Carroll Bartlett and Mr. S. C. Irving, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 1331. October Term 1905.

Elizabeth Peck,
vs.
The Tribune Company.

The Clerk will enter my appearance as Counsel for the plaintiff in error.

BARTLETT & IRVING,
CHARLES CARROLL BARTLETT
S. C. IRVING.

Indorsed: Filed Sep. 24, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-fourth day of September, 1906, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John Barton Payne and Mr. Frank R. Cain, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 1331. October Term 1905.

Elizabeth Peck,
vs.
Tribune Company.

The Clerk will enter my appearance as counsel for the defendant in error.

JOHN BARTON PAYNE and
FRANK R. CAIN.

Indorsed: Filed Sep. 24, 1906. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit on the second day of October, 1906, of the October term in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

And afterwards, to-wit: On the second day of January, 1907, in the October term last aforesaid, there was filed in the office of the clerk of this court a stipulation of counsel, which stipulation is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Elizabeth Peck
v.
Tribune Company. } No. 1331.

It is hereby stipulated and agreed by the parties hereto that

the time for filing the brief of the defendant in error is hereby extended to January 15, 1907.

BARTLETT & IRVING,
Attorneys for Plaintiff in Error.
JOHN BARTON PAYNE and
FRANK R. CAIN,
Counsel for Defendant in Error.

Indorsed: Filed Jan. 2, 1907. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the second day of January, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, January 2, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1331 Elizabeth Peck *vs.* The Tribune Company. } Error to the Circuit Court of the United States for the Northern District of Illinois Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 18, 1907.

And afterwards, to-wit: On the eighteenth day of January, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, January 18, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Elizabeth Peck
1331 *vs.*
The Tribune Company.
} Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. S. C. Irving, counsel for plaintiff in error, and by Mr. John Barton Payne, counsel for defendant in error, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixteenth day of April, 1907, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1906.

No. 1331. January Session, A. D. 1907.

Elizabeth Peck,
Plaintiff in Error,
vs.
The Tribune Company.
} Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker, and Seaman, Circuit Judges.

The case in the court below was an action at law by plaintiff in error, a citizen of Iowa, against defendant in error, a corporation organized under the laws of Illinois, to recover damages for the printing in its newspaper by defendant in error, of the following advertisement:

Nurse and Patients Praise Duffy's

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating Life-Giving and Curative Properties of DUFFY'S PURE MALT WHISKEY.

"For that weak, run-down and gone feeling, it is the best tonic and stimulant in the world."

MRS. A. SCHUMAN.

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it, as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling,' and once that Duffy's is within their reach it is used always."—Mrs. A. Schuman, 1676 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to the medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down, weakened, diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and is the only whiskey recognized by the government as medicine.

There is but one Duffy's Pure Malt Whiskey. Insist on having the genuine and refuse cheap substitutes and imitations offered by unscrupulous dealers, which are placed on the market for profit only and which are positively harmful to both body and brain. Look for the trade-mark, the "Old Chemist," on the label, and be sure the seal on the bottle is unbroken. Sold in sealed bottles only; never in bulk.

All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free. Duffy's Malt Whiskey Co., Rochester, N. Y.

The averment of the declaration being that the picture on the face of such advertisement, instead of being that of Mrs. A. Schuman, as stated, was and is, the picture of plaintiff in error, published without her knowledge or consent.

The first two counts of the declaration proceed as for libel, the plaintiff in error denying as stated in the publication respecting Mrs. Schuman, that she was a nurse, and denying as stated in the publication respecting Mrs. Schuman that she had ever used or recommended Duffy's Pure Malt Whiskey. And in these counts the further averment appears:

Plaintiff further states that the allegation in said publication that she does use and has used and does recommend and has recommended the use of said whiskey is false, malicious, scandalous and defamatory: That she is and always has been a non-user and abstainer from whiskey and all spirituous liquors: That the allegation in said publication so charging the plaintiff with the use of whiskey and recommending its use to the public has been and is greatly humiliating to the plaintiff; and that said publication has brought the plaintiff and her family into contempt and ridicule before the world.

Also this averment, that the "effect and meaning of said publication are to charge the plaintiff with the use of whiskey and to publish the same to the world, and to allege and publish of and concerning the plaintiff that she has used Duffy's Malt Whiskey constantly for years and to proclaim to the world that she has been and is a nurse and has and does recommend the use of whiskey to the public."

The last count of the declaration proceeds as for invasion of plaintiff in error's right of privacy, averring that in the printing of this advertisement, the plaintiff in error has been greatly distressed and humiliated.

The general issue having been pleaded, trial was had, resulting in an instruction to the jury by the court, to find a verdict for the defendant— the evidence tending to show that the averments of the declaration, as already stated, were true, but that the defendant in error had no knowledge, at the time of its publication, that the portrait printed was the portrait of plaintiff in error, or was other than the portrait of Mrs. Schuman.

Grosscup, Circuit Judge, after stating the facts, delivered the opinion:

The plaintiff in error indisputably has suffered a wrong, the gist of which is that by the publication of her picture in

connection with a patent medicine advertisement, people who recognize the portrait will be led to think that she has loaned her face, and perhaps her name, in a way that a self respecting person would not have consented to. Were the case under review an application for an injunction to restrain future publications, or were it an action at law against the parties consciously responsible for the make-up of the advertisement, a question wholly different from the one presented by this record would be involved.

The first question presented here is, whether the plaintiff in error made out a case of libel in her declaration and proof—the gravamen of the action, as set forth in the declaration, being, that whereas plaintiff in error was not a nurse, and did not either for herself, or as nurse, use Duffy's Malt Whiskey as a tonic, the advertisement was calculated to convey the impression that she was a nurse, and that both for herself, and as nurse she had used Duffy's Malt Whiskey as a tonic. This being the whole of the libel charged, and there being no averment of special damages, the question is: Is such a publication libelous per se? We think not. It is not, in our opinion, libelous, per se, to say of a person that she is a nurse, or that she has used as a tonic Duffy's Pure Malt Whiskey, or has recommended its use. Nor do we think that these things said of a person, independently of other averments or circumstances, make out a case to go to a jury for determination. Doubtless there are people, by whom the use of whiskey as a tonic is considered wrong; and there may be people among whom to be a nurse, is considered something less desirable than not to be a nurse. But the world has not yet arrived at a concensus of opinion on these matters, that to say these things of a person is independently of all other considerations, to libel him.

This brings us to the other count—that the publication of the advertisement is an invasion of plaintiff in error's right of privacy. The difficulty with this count, and with the proof in support of it, is, that defendant in error stood in relation to the advertisement as printer a distributer only, acting without knowledge that the face printed and distributed was that of plaintiff in error, or was not that of the person whose face it purported to be; and as printer and distributer of matter offered as advertising matter, there cannot be indulged that presumption of malice that might possibly be indulged if the matter were printed as a part of the newspaper's collection of news: Now where there is no malice,

and no technical trespass to reality or personality, or other case involving the adjudication of title, or some other substantial right, which it was important to the plaintiff to establish, the maxim de minimis non curat lex is in some states applied, and recovery for nominal damages not allowed.

But we need not put an affirmance of the judgment below upon this ground. There was no request made in the court below for the allowance of nominal damages. There is no assignment of error that nominal damages were not allowed; so that there may be applied, we think, the doctrine prevailing in Indiana, New York and other states (no Illinois case, or cases from the United States Supreme Court having been brought to our attention) that a judgment under such circumstances will not be reversed for failure alone to give nominal damages. Rhine, Admr. v. Morris, 96 Ind. 81; Platter v. The City of Seymour, 86 Ind. 323; Funk v. The Evening Post Publishing Co., 76 Hun (N. Y.) 497.

The judgment of the Circuit Court is affirmed.

And afterwards, on the same day, to-wit: On the sixteenth day of April, 1907, in the October term last aforesaid, the following further proceedings were heard and entered of record, to-wit:

Tuesday, April 16, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Peter S. Grosscup, Circuit Judge presiding.
Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Elizabeth Peck		Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.
1331	*vs.*	
The Tribune Company.		

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 10, inclusive, contain a true copy of the papers filed (except briefs of counsel) and proceedings had thereon in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Elizabeth Peck vs. The Tribune Company, No. 1331, October Term, 1906, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this thirtieth day of September, A. D. 1907.

EDWARD M. HOLLOWAY,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

United States Circuit Court of Appeals, Seventh Circuit.

ELIZABETH PECK, Plaintiff in Error,
vs.
THE TRIBUNE COMPANY, Defendant in Error.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Stipulation as to Return on Writ of Certiorari.

It is stipulated, by and between the parties hereto, through their respective counsel, that the certified copy of the transcript of record in this cause, filed by the Clerk of this Court, and now on file in the office of the Clerk of the Supreme Court of the United States, in an application therein made for a writ of *certiorari* in this cause, entitled "Elizabeth Peck, Petitioner, against The Tribune Company, Respondent, Number 480, of the October Term, 1907," shall be taken as a return to the writ of *certiorari* granted by the said Supreme Court of the United States in the 28th day of October, 1907, and issued under date of October 30, 1907.

RUFUS S. SIMMONS,
S. C. IRVING,
FRANK J. R. MITCHELL,
SIMMONS, MITCHELL & IRVING,
Attorneys for Petitioner.
JOHN BARTON PAYNE,
FRANK R. CAIN,
Attorneys for Respondent.

Endorsed: Filed Nov. 5, 1907. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Elizabeth Peck is plaintiff in error, and The Tribune Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the

said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 20,883. Supreme Court of the United States. No. 480, October Term, 1907. Elizabeth Peck *vs.* The Tribune Company. Writ of Certiorari. Filed Nov. 5, 1907. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *Seventh Judicial Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Elizabeth Peck, Plaintiff in Error, *vs.* The Tribune Company, Defendant in Error, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of November, A. D. 1907.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] File No. 20,883. Supreme Court U. S. October Term, 1907. Term No. 480. Elizabeth Peck, Petitioner, *vs.* The Tribune Co. Writ of Certiorari and return. Filed Nov. 7th, 1907.

FILED
OCT 12 1907
JAMES H. McKENNEY,
CLERK

No. ~~430~~, 191

Supreme Court of the United States

ELIZABETH PECK,
Petitioner,

vs.

THE TRIBUNE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Attorneys for Petitioner.

GUNTHORP-WARREN PRINTING CO., CHICAGO

Supreme Court of the United States.

ELIZABETH PECK,

Petitioner,

vs.

THE TRIBUNE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION.

To the Honorable, the Justices of the Supreme Court of the United States:

Your petitioner, Elizabeth Peck, represents that she was at all of the times hereinafter set forth a citizen of the State of Iowa, and the respondent, The Tribune Company, a citizen of the State of Illinois, and petitioner prays for a writ of *certiorari* to the United States Court of Appeals in the Seventh Circuit to review the decision of that court in a cause in which your petitioner was plaintiff in error and the respondent was defendant in error, rendered in April, 1907, affirming a judgment of the United States Circuit Court for the Northern District of Illinois.

And your petitioner represents that she always has been a person of good name and reputation, of temperate habits and has enjoyed the esteem and good opinion of her neighbors and countrymen; and while residing with her two sons at her home in the Town of Mt. Auburn, in the State of Iowa, the respondent The Tribune Company, being a publisher of a certain newspaper in the City of Chicago called the Chicago Sunday Tribune, did on or about October 22nd, 1905, invade her right of privacy and disturb the enjoyment of her peace and quiet by publishing without her knowledge or consent a true and correct picture of your petitioner in the issue of its newspaper of that date as part of an advertisement containing an alleged testimonial by your petitioner, using the name of Mrs. A. Schuman, to exploit the alleged virtues of Duffy's Pure Malt Whiskey, which publication was in the letters and figures and form as follows (Rec., 9):

Nurse and Patients Praise Duffy's

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of DUFFY'S PURE MALT WHISKEY.

"For that weak, run-down and gone feeling, it is the best tonic and stimulant in the world."

MRS. A. SCHUMAN.

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling,' and once that Duffy's is within their reach it is used always."—**Mrs. A. Schuman**, 1676 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to the medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down, weakened, diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and is the only whiskey recognized by the government as medicine.

There is but one Duffy's Pure Malt Whiskey. Insist on having the genuine and refuse cheap substitutes and imitations offered by unscrupulous dealers, which are placed on the market for profit only and which are positively harmful to both body and brain. Look for the trade-mark, the "Old Chemist," on the label, and be sure the seal on the bottle is unbroken. Sold in sealed bottles only; never in bulk.

All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free. Duffy's Malt Whiskey Co., Rochester, N. Y.

Your petitioner represents that she had no knowledge of and never authorized the use of her picture in connection with an advertisement of whiskey or for any other purpose, and never gave any testimonial to or for Duffy's pure malt whiskey, or ever used or recommended the same to any person; that she is and always has been a non-user and abstainer from all spirituous liquors; that she is not one of Chicago's most capable and experienced nurses; and that all the statements in said advertisement are false and fraudulent, and the use of her picture and all of the statements in said advertisement with respect to your petitioner are false and malicious and defamatory, and the publication of the same has greatly humiliated and brought your petitioner and her family into contempt and ridicule before the world.

And thereupon, on the 31st day of January, 1906, your petitioner brought an action in the Circuit Court against the respondent for the recovery of $25,000 as damages, one count in the declaration being for the invasion of petitioner's right of privacy (Rec., 8) and two counts for libel. (Rec., 4-7.)

The respondent filed a demurrer to the declaration on February 20th, 1906, which it withdrew on the 19th day of March, and thereafter filed a plea of the general issue on March 26th (Rec., 10-11), and the cause came on for trial on the 14th day of May, 1906, before a jury (Rec., 12); and after hearing the evidence offered by the petitioner the Circuit Court sustained a motion of the respondent to have the jury instructed to return a verdict in its favor, which, under the instructions of the court, the jury did, and a judgment was

thereupon rendered against your petitioner. (Rec., 12-13.)

Your petitioner perfected her appeal to the Circuit Court of Appeals, assigning as error the instruction of the trial court to the jury to find the defendant not guilty and its refusal to permit your petitioner to prove that she was not a nurse and had not been accustomed to the use of Duffy's pure malt whiskey, and said Circuit Court of Appeals upon the hearing thereof affirmed the judgment of the Circuit Court against your petitioner.

Your petitioner represents that she is advised the said Court of Appeals erred in its decision in denying petitioner's right of privacy and the enjoyment of her peace and quiet thus invaded and disturbed by the publication of her picture in connection with an advertisement of Duffy's pure malt whiskey; that said decision respecting the right to privacy involves a weighty and important question of the personal right of your petitioner and of all other persons in private stations in life and those occupying offices and places of public trust and confidence in the Federal and State Governments whose rights are invaded by unauthorized and scandalous uses of their pictures and photographs and particularly because the decision of the Court of Appeals of the Seventh Circuit in said cause is contrary to a principle announced by this court in respect to a man's property in his name and to the views upon the subject of the right to privacy when applied to the human face, expressed by Mr. Justice Brown before the New York Bar Association, and to views expressed by Judge Colt of the Circuit Court of the United States for the Dis-

trict of Massachusetts and to decisions of the Supreme Court of Georgia and of Louisiana and of other courts.

And your petitioner further represents that through the decision she has suffered a further grave injustice, because, immediately after the Court of Appeals had announced its opinion, the Superior Court of Cook County, Illinois, upon the authority of said opinion, after having entertained and settled the issues preparatory for trial, dismissed another suit instituted in the State Court by your petitioner for the invasion of her right of privacy and for libel by a similar publication in Hearst's Chicago American, a newspaper published and circulating in Illinois. (Said cause is No. 256,840, *Elizabeth Peck, plaintiff*, v. *Hearst's Chicago American, defendant.*)

Your petitioner further represents that her picture accompanying said advertisement and the same false and defamatory statements concerning her were published in divers issues on sundry widely separated dates in over a hundred newspapers in the United States with an aggregate circulation and distribution of over five million copies.

Your petitioner further represents that she is advised that the decision of the Court of Appeals, holding that the publication was not libelous *per se* and substituting the opinion of the court for that of a jury is in conflict with the decision of this court in *White* v. *Nicholls*, 3rd Howard, holding that a publication which is calculated to make a man ridiculous is *prima facie* a libel and to the distinction recognized by this Court in *Pollard* v. *Lyon*, 91 U. S., between slander and libel.

That the decision is also in conflict with decisions of the Circuit Courts of Appeal in the Second Circuit and Sixth Circuit; and is in conflict with the decisions of the Supreme Judicial Courts of New York and Massachusetts and many other state courts and the courts of England, establishing the principle that when a publication is open to a construction which would tend to bring a person into ridicule or lessen the esteem or respect of society for him it is a question for the jury to determine whether it is libel or not, and is also in conflict with decisions which hold that acting without knowledge is no excuse for the one charged with a libel.

Your petitioner files a certified copy of the record in said cause in the Court of Appeals as a part of this petition.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of this court directed to the Circuit Court of Appeals of the Seventh Circuit, directing it to certify to this court a record of its proceedings in said cause.

ELIZABETH PECK.
By SIMMONS, MITCHELL & IRVING,
Her Attorneys.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Counsel for Petitioner.

United States of America,
State of Pennsylvania, } ss.
County of Montgomery.

Elizabeth Peck, being first duly affirmed deposes and says that she is the petitioner named above, that she has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact, except to those matters therein stated to be upon information and belief, and as to those, she believes said petition to be true.

ELIZABETH PECK.

Subscribed in my presence and affirmed to before me this 26th day of September, 1907.

EDW. W. MILLER,
Notary Public.

(Seal)

Commission expires January 21, 1911.

No. [redacted] 191

Supreme Court of the United States

ELIZABETH PECK,
Petitioner,

vs.

THE TRIBUNE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN SUPPORT OF PETITION.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Counsel for Petitioner.

GUNTHORP-WARREN PRINTING CO., CHICAGO

Supreme Court of the United States.

ELIZABETH PECK,

Petitioner,

vs.

THE TRIBUNE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN SUPPORT OF PETITION.

The ruling of the judges in the Seventh Circuit upon the "right to privacy" is erroneous and we submit the question is one of unusual gravity and importance affecting all the citizens of the country in private and in public life. It is "an important and vexed subject," to use the expression of Mr. Justice Dodge in his dissenting opinion in *Klug* v. *Sheriffs*, 129 Wis., 468, 476.

Their holding upon the libel feature of the case is in conflict with the decisions of this court itself, of several of the other Circuit Courts of Appeal, of the Supreme Court of every state in the Union which has

spoken upon the subject, and of the law of England. The decision is so surprising in view of the opening sentence of the opinion that it is difficult to follow the reasoning of the court.

I.

RIGHT TO PRIVACY.

The conclusion of the Court of Appeals upon the right to privacy stands opposed to the views of Mr. Justice Brown, a former member of this court, of Judge Colt in the United States Circuit Court in Massachusetts, of the Supreme Courts of Georgia and Louisiana and other courts of high repute. Besides, the principle adopted is contrary to another principle held by this court that "a man's name is his own property" and to an overwhelming consensus of opinion by able writers on jurisprudence, and has met with almost unanimous disapproval of the press and people of the country, called forth by an opinion of Judge Alton B. Parker in the case of *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y., 538. That decision by a divided court in New York affords little support for the ruling by the judges in the Seventh Circuit. Of that case Judge Dill recently said in delivering the opinion of the Court of Errors and Appeals of New Jersey, it is "seldom cited but to be disapproved."

> *Vanderbilt* v. *Mitchell*, 67 Atlantic Reporter, 97, 100.

The question involved is the sacred right of a woman of spotless reputation and blameless life, to

say that even under an *alias* her face shall not be "blown about the pendant world" before the eyes of millions of her countrymen to advertise a certain brand of whiskey, charging her at the same time with the twin falsehoods of holding herself out as a nurse and of having for years used and advocated the use by others of intoxicating liquors. Mr. Justice Brown declared before the New York State Bar Association that.

> "The publication of individual likenesses, * * * is equally an invasion of one's right to privacy * * * But if a man may appear in public or seclude himself, as he sees fit, there is no sound reason why he should not determine the circumstances under which his face shall be exhibited in the newspapers."
>
> 34 Am. Law Rev., 321, 329.

The holding by this court in its opinion in *Brown Chemical Co.* v. *Meyer*, 139 U. S., 540, 544, announced by Mr. Justice Brown, that "A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property," led Vice Chancellor Stevens to remark that if true "it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it."

> *Edison* v. *Edison Polyform Mfg. Co.*, 67 Atlantic Reporter, 392, 394.

The remarks of Mr. Justice Peckham when a member of the New York Court of Appeals and delivering the opinion in *Schuyler* v. *Curtis*, 147 N. Y., 434, 446-

452, do not seem to indicate a view of this subject opposed to the application here of the principle recognized by this court in the Meyer case.

Judge Colt of the United States Circuit Court adds the expression of his own opinion in *Corliss* v. *Walker*, 64 Fed., 280, where he says at page 282:

> "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right;"

The notable and exhaustive opinion by the Supreme Court of Georgia, in *Pavesich* v. *Ins. Co.*, 122 Ga., 190, reviews ancient and modern law and concurs with Mr. Justice Brown in his views upon the right to privacy. Speaking for a united court of seven judges, Mr. Justice Cobb said, at page 194-196:

> "A right of privacy in matters purely private is therefore derived from natural law * * * Subject to * * * limitation, * * * the body of a person cannot be put on exhibition at any time or at any place without his consent."

Referring to Roman jurisprudence, he shows (page 197) how that law considered "An outrage was committed not only by striking with the fists, * * * it was an outrage or legal wrong to merely follow an honest woman or young boy or girl." Mr. Justice Cobb then declares (page 198) that "the common law has both tacitly and expressly recognized the right of an individual to repose and privacy," and a violation of that right "is a direct invasion of a legal right" (pp. 201-202) which entitled the aggrieved person to recover damages as in other torts of a similar nature.

The vigorous dissenting opinion by Judge Gray in

the New York case is quoted at length and approved by the Georgia court. The argument of Judge Gray in the Roberson case (pp. 563-565) which involved the use of a young woman's portrait upon an advertisement of flour, is peculiarly appropriate to the case of this petitioner:

> "But if it is to be permitted that the portraiture may be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results possibly more formidable and more painful in its consequences than an actual bodily assault might be * * * I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have, if they were publishing her literary compositions. * * * Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason."
>
> *Roberson* v. *Rochester Folding Box Co., supra.*

There is a luminous conception of the right to privacy in Judge Gray's statement that this right is "the complement of the right to the immunity of one's person." (Page 213.)

Even a man who had been arrested and charged with crime was held, by the Supreme Court of Louisiana, entitled, before conviction for the crime to prevent the display of his photograph in the rogues' gallery.

Itzkoritch v. *Whitaker*, 115 La., 479.

The case at bar is not one for equitable relief but for damages, and it is the very case supposed by Lord North in his opinion in *Pollard* v. *Photographic Co.*, L. R. 40, Chy. Div., 345, 353-354. If an injunction is

proper, as has been determined in so many well considered cases, to prevent the unauthorized use of a person's photograph, much more does an action for damages lie to redress that injury.

The principle involved in the decision against petitioner does not concern, it is true, vast property interests of fabulous value, but we assume with confidence that, humble as this petitioner may be, and while no interest is too large for the consideration of this court, none is too small for its careful attention. The ancient rule laid down for the guidance of the judges of a famous race of people, that "thou shalt not respect the person of the poor nor honor the person of the mighty," has always been the motto of this court. The petitioner is therefore inspired with hope that the question of law in her case will appeal to the judges as one of such gravity and importance that they will be inclined to issue the writ of *certiorari* to review a decision which should not be allowed to stand unchallenged, not only because it creates a want of uniformity in decisions, but has induced a state court in Illinois to dismiss a similar action, brought by her against another newspaper, after having entertained the suit settled the issues and made ready for trial.

But, beyond all this, for another reason it is of the highest importance in this day and age that the rule as to privacy here involved should be settled by this court and settled right. Every day brazen liberties are taken with those who dwell in high places of the earth as well as those who live perchance in hovels. It is fresh in the memory of our people, as suggested by the Georgia court, how one occupying the exalted posi-

tion of president of the United States is in danger of having his face used "to ornament the bar of the saloonkeeper or decorate the walls of a brothel." The course of events in this land has shown there is strong temptation to this abuse with respect to the faces of those in public station. Even the wives and daughters of officials prominent in the nation have not escaped the humiliation of this unbridled license by commercial pirates.

The gravity and importance of the question here involved is further indicated by the fact that the decision of the Edison case by Vice Chancellor Stevens in July of this year called forth the approval, as Judge Parker's contrary ruling had, the condemnation of the public press. An editorial writer makes use of the following language:

> "A New Jersey judge has ruled that a man's face is as much his own property as his name, * * * Such decisions will eventually check an abuse which has grown to vast proportions with the spread of general advertising. The statesman, the popular man of the hour, the distinguished actor or singer having a just grievance against this sort of personal advertising will be protected both in the use of his name and the exploiting of his countenance. They, with the equally suffering prima donna will not be compelled to endure unrequited the annoyance of seeing their pictures used in connection with the advertisement of the merits of a patent medicine, a complexion beautifier, a breakfast food, or a five-cent cigar. When the courts have spoken at all in this matter they have sided unreservedly with the victim who has been thus pictured and have plainly defined his rights and privileges. * * * It matters little what the personal objections may be; the point is that a man's face is his own and may not be used, without his

> consent, to promote the financial considerations of enterprising merchants and venders of nostrums. The fact that the abuse has been suffered to grow unchecked, or that various persons in the public eye have been pleased rather than angered by the liberty, is not an excuse for the general practice, and it may be hoped that the recent decisions protecting remonstrants will go a long way toward abolishing the impertinence."
>
> (New Orleans Times-Democrat of August 1, 1907, page 6, reprinted from the editorial in the Chicago Tribune of July 29, 1907.)

The suggestion of the Court of Appeals respecting an injunction by petitioner to prevent future publications is no consolation "to the victim who has been thus pictured." Without the pain which a money judgment inflicts, he who wrongs another would go unwhipped of justice, for the writ of injunction is not a lash which leaves a sting to remind him that he must not wound the innocent.

Moreover, the opinion and judgment of the Court of Appeals was based upon a grave error which it committed in assuming a fact not pleaded and not proved. It is said the newspaper acted "without knowledge." The only record on that subject is an unanswered question on cross-examination. (Rec., 20.) This error was made the basis of the court's denial of relief for the wanton invasion of petitioner's rights. It is at best the excuse of one who shuts his eyes and blindly does an act which injures another. The third person pointed out by the court as the culprit may in turn offer the like excuse of ignorance.

This assumed distinction between the one who know-

ingly conceives and the one who ignorantly executes a wrong of this nature never was the law in any court in any land. Mr. Justice Holmes when sitting in the Supreme Judicial Court of Massachusetts pointed this out in his dissenting opinion in *Hanson* v. *Globe Newspaper Co.*, 159 Mass., 293, 299, 301. So has Mr. Justice Story in *Dexter* v. *Spear*, 4 Mason, 115, 117, and many of the ablest judges that ever sat upon any bench.

II.

LIBEL.

The holding in the Seventh Circuit, that the publication was not libelous has brought that court into conflict with this court.

In delivering the opinion of the court in *White* v. *Nicholls*, 3rd How., 266, Mr. Justice Daniel says, at page 291:

> "That every publication, either by writing, printing or pictures which charges upon or imputes to any person that which renders him liable to punishment or which is calculated to make him infamous or odious or *ridiculous* is *prima facie* a libel." (Italics ours.)

Again the Court of Appeals has not followed the guidance of this court in another respect. A fundamental distinction in the law of libel overlooked by the Court of Appeals was pointed out by Mr. Justice Clifford in *Pollard* v. *Lyon*, 91 U. S., 225-228, that "there is a marked distinction between slander and libel and that many things are actionable when written or printed and published which would not be actionable if merely spoken."

The decision is also in conflict with the Court of Appeals in the Second and in the Sixth Circuit.

The ruling upon this subject in the Second Circuit is found in an opinion of the Court of Appeals delivered by Judge Lacombe in *Press Publishing Co.* v. *McDonald*, 63 Fed., 238, 241-242.

The opinion in the Sixth Circuit was written by Mr. Justice Day when a member of the Court of Appeals and is found in *Culmer* v. *Canby*, 101 Fed., 195, 197.

The ruling is also in conflict with the decisions of the Supreme Judicial Tribunals of New York and Massachusetts.

Twombly v. *Monroe*, 136 Mass., 464, 469, decision by Field, J.

Morrison v. *Smith*, 177 N. Y., 366, 368-369, decision by Gray, J.

It is equally opposed to the law established by the courts of England.

Odgers on Libel and Slander, star pages 19, 25, 94, 469.

Over and over again it has been laid down that libel or no libel is pre-eminently a question for a jury when the publication is open to a construction which would make it a libel.

But in its decision the Court of Appeals has rewritten the law of libel. After admitting that the petitioner "indisputably has suffered a wrong * * *" and that "people who recognize the portrait will be led to think that she has loaned her face * * * in a way that a self-respecting person would not have consented to," the court answers its own

question, "is such a publication libelous *per se*?" by saying, "We think not." In coming to that conclusion the judges failed to observe the rule recognized by Mr. Justice Day in *Culmer* v. *Canby*, *supra*, that "if * * * the words * * * are capable of a construction which would make them actionable * * * it is for the jury to determine under all the circumstances * * * in what sense they were used." The Court of Appeals says "The world has not yet arrived at a consensus of opinion on these matters." But it is the consensus of a jury of twelve men and not a "consensus of the world" that petitioner is entitled to have when the words are "capable of a construction" that she had done something which no "self-respecting person" would have consented to do.

Mr. Justice Day further said in *Culmer* v. *Canby* that words are actionable which tend to "lessen the esteem" of society for the man. The Court of Appeals admits that people will think the petitioner has "loaned her face" in a way no "self-respecting" person would have consented to do. Would not that "lessen the respect" of people for her? Are not respect and esteem the same? Is not the publication which tends to forfeit either, a libel?

The words and the photograph are also fairly susceptible of the construction that she had "sold her face" for a consideration. And either meaning would tend to disgrace her. It would lay her open to the contempt, ridicule and scorn of any people.

In pronouncing the judgment which they did the judges in effect held the words actionable but denied this petitioner's right of action. In so doing they

granted to the respondent newspaper the privilege to libel petitioner without redress.

All persons, high and low everywhere, are interested in having this court settle the *right to privacy*. It is also important that there should be uniformity of decision in the Courts of Appeal upon the question of libel.

There appear to be no interests which will suffer by allowing the writ of *certiorari*. Those interests concerned in its issuance and the questions presented for consideration are such that we earnestly hope the judges of this court will see the way clear to grant petitioner's prayer for the writ.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Attorneys for Petitioner.

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Office Supreme Court, U. S.
FILED.
OCT 18 1907
JAMES H. McKENNEY,

Supreme Court of the United States

ELIZABETH PECK, *Petitioner,*

vs.

THE TRIBUNE COMPANY, *Respondent.*

No. ~~481~~ 4

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

SUGGESTIONS IN OPPOSITION.

JOHN BARTON PAYNE,
FRANK R. CAIN,
Attorneys for Respondent.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

ELIZABETH PECK, *Petitioner,*

vs.

THE TRIBUNE COMPANY, *Respondent.*

SUGGESTIONS FOR RESPONDENT IN OPPOSITION.

I.

This court is asked to issue a writ of *certiorari* because of the alleged importance of this case, that it involves petitioner's right of privacy.

No such question is necessarily involved upon this record.

The action is for libel, for damages for publishing an advertisement, wherein the picture of the petitioner was published in connection with a certificate of Mrs.

Schuman, a Chicago nurse, recommending Duffy's Pure Malt Whiskey.

The real question is, whether such a publication is libelous *per se*.

No allegation of special damage was made, no proof of special damage offered. The publication tested by all known rules of law is not libelous *per se*, hence not actionable in the absence of allegation and proof of special damage.

If this were a bill to enjoin the publication of such an advertisement, *the right of privacy* would be involved, but since the publication has been made, and this merely an action to recover damages, it falls within the well recognized rules of law applicable to cases of libel and must be tested by those rules, and if the *article* is not libelous *per se*, it can not be libelous *per se* to publish a likeness of the petitioner, in connection with the article, even though the article and the picture constitute an advertisement.

It is said in the petition:

> "She (petitioner) is and always has been a non-user and abstainer from all spirituous liquors; that she is not one of Chicago's most capable and experienced nurses; and that (p. 4) all the statements in said advertisement are false and fraudulent, and the use of her picture and all of the statements in said advertisement with respect to your petitioner are false and malicious and defamatory; * * * that (p. 5) said decision respecting the right to privacy involves a weighty and important question of the personal right of your petitioner and of all other persons * * * whose rights are invaded by unauthorized and scandalous uses of their pictures and photographs: * * * that

through the decision (p. 6) she has suffered a further grave injustice, because, immediately after the Court of Appeals had announced its opinion, the Superior Court of Cook County, Illinois, upon the authority of said opinion, after having entertained and settled the issues preparatory for trial, dismissed another suit instituted, * * * for libel by a similar publication in * * * a newspaper published and circulating in Illinois; that her picture accompanying said advertisement and the same false and defamatory statements concerning her were published in divers issues on sundry widely separated dates in *over a hundred newspapers;* * * * that the decision of the Court of Appeals, holding that the publication was not libelous *per se* * * * is in conflict with the decisions of many other courts holding * * * that it is a question for the jury to determine whether it is a libel or not."

The weighty importance of the case, therefore, is that the effect of the decision, in holding that the publication was not libelous *per se*, was to deny the right of the petitioner to recover in some hundred other libel suits, instituted or about to be instituted by petitioner based upon the same publication, against other newspapers, and caused the dismissal of another suit by petitioner against Hearst's Chicago American. This may be important to the petitioner, as an individual, but is not of gravity and importance in the sense contemplated by law.

Lau Ow Bew, 141 U. S., 583.

These facts are not to be found in the record, but their importance to petitioner is such that they are dragged in by the heels.

II.

The learned counsel do not correctly state the effect of the decision of the Circuit Court of Appeals in saying it denied the plaintiff's right to privacy. On the contrary the court said:

> "Were the case under review an application for an injunction to restrain future publications, or were it an action at law against the parties consciously responsible for the make-up of the advertisement, a question wholly different from the one presented by this record would be involved. The first question presented here is, whether the plaintiff in error made out a case of libel in her declaration and proof—the gravamen of the action, as set forth in the declaration, being that whereas plaintiff in error was not a nurse, and did not either for herself, or as nurse, use Duffy's malt whiskey as a tonic, the advertisement was calculated to convey the impression that she was a nurse and that both for herself and as nurse she had used Duffy's Malt Whiskey as a tonic. This being the whole of the libel charged, and there being no averment of special damages, the question is: Is such a publication libelous *per se?* We think not. * * * This brings us to the other count, that the publication of the advertisement is an invasion of the plaintiff in error's right of privacy. The difficulty with this count, and with the proof in support of it, is, that defendant in error stood in relation to the advertisement as printer and distributor only, acting without knowledge that the face printed and distributed was that of plaintiff in error, or was not that of the person whose face it purported to be; and as printer and distributor of matter offered as advertising matter, there cannot be indulged that presumption of malice that might possibly be indulged if the matter were printed as

a part of the newspaper's collection of news: Now where there is no malice, and no technical trespass to realty or personalty, or other case involving the adjudication of title, or some other substantial right, which it was important to the plaintiff to establish, the maxim *de minimis non curat lex* is in some states applied, and recovery for nominal damages not allowed. But we need not put an affirmance of the judgment below upon this ground. There was no request made in the court below for the allowance of nominal damages."

III.

In the brief (p. 8) the Court of Appeals is taken to task for saying the respondent, in publishing the advertisement without knowledge, and claim that the picture was that of the petitioner. This error was made the basis of the court's denial of relief for the want of invasion of petitioner's rights. The learned counsel forget that no scienter is alleged in their declaration; that no proof was offered tending to show any knowledge on the part of the respondent that the picture was not the picture of the nurse, Mrs. Schuman, and that where no scienter is alleged and no proof offered tending to show knowledge, it must be assumed that no knowledge existed. It also appeared by the proof that petitioner resided for the three years last past (R., 26) at Mt. Auburn, Iowa, a village of 300 people, in Benton county, on the Rock Island road; that the Christian Church is one of the principal churches in the village, and that she, in January, 1906, after the publication of the article in question, was elected president of the Woman's Aid Society of that church and

was such president at the time she testified at the trial of the lawsuit.

IV.

Counsel insists there is conflict between the decision here attacked and the decisions in *Pollard* v. *Lyon*, 91 U. S., 225, and *Culmer* v. *Canby*, 101 Fed., 195, decided by the Sixth Circuit, and other cases named. *Pollard* v. *Lyon* was slander and the words imputing flagrant conduct to the plaintiff were held not actionable in the absence of special damage. *Culmer* v. *Canby* was a demurrer to a petition for libel. Mr. Justice Day said (196-7):

> "Before a demurrer can be sustained to a petion counting on an alleged libelous publication, it must appear that the publication is not reasonably capable of a defamatory meaning, and cannot reasonably be understood in a defamatory sense. If an inspection of the publication convinces the court that no such reasonable construction of the language used could give to it a defamatory sense and meaning, a demurrer should be sustained; otherwise, its meaning and interpretation must be left to the jury, under proper instructions as to what constitutes libel."

There is certainly no conflict here.

The other cases have as little significance.

There is nothing, we beg to suggest, which takes this case out of the ordinary run of everyday libel suits, and we respectfully ask that the petition for a writ of *certiorari* be denied.

JOHN BARTON PAYNE,
FRANK R. CAIN,
Attorneys for Respondent.

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Office Supreme Court, U.
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APR 29 1909
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No. 191

OCTOBER TERM, 1908.

upreme Court United States

ELIZABETH PECK,
Petitioner,

vs.

THE TRIBUNE COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

ELIZABETH PECK,
Petitioner,

vs.

THE TRIBUNE COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

An opinion of the Court of Appeals delivered by Judge Grosscup (40-44)) affirming the action of Judge Bethea in the Circuit Court instructing a jury to find the defendant not guilty (24) of the offenses charged, is reported in *Peck* v. *Tribune*, 154 Fed., 330; s. c., 83 C. C. A., 202.

This court allowed a writ of *certiorari* to review the proceedings on October 30th, 1907 (46-47).

Form of Action.

The plaintiff, Elizabeth Peck, filed in January, 1906, a declaration in a common law action against the defendant for damages in the sum of $25,000 (4-10).

Two counts (4-8) were based upon libel by publishing in the Chicago Tribune in October, 1905, plaintiff's picture in connection with an advertisement of and a false testimonial to Duffy's Whiskey.

A third count complained that the same publication was a violation of plaintiff's right to privacy (8).

The defendant demurred to the declaration (10), then withdrew the demurrer and pleaded the general issue (11). The case was submitted to a jury and after the plaintiff's evidence was heard the court granted defendant's motion to instruct the jury to return a verdict for defendant, which was done and judgment was entered in favor of defendant (12-13).

A bill of exceptions containing all the evidence was made a part of the record (14-24). On error to the Court of Appeals (25) the plaintiff assigned certain errors (26-28) and that court in an opinion (40-44) affirmed the judgment of the Circuit Court (44).

Leading Facts.

Elizabeth Peek, the plaintiff, is a widow who has resided for about three years in Mt. Auburn, Iowa, where she now keeps house and lives with her two sons in her own home. Prior to that time she had resided with her husband before his death for fourteen or fifteen years in Chicago, Illinois (14, 18-19).

On October 22nd, 1905, the defendant published in its newspaper, the Chicago Sunday Tribune, in connection with a whiskey advertisement the picture of plaintiff and that of her son, Mark Peek (15-16, 20-21).

The advertisement purported to contain the testimonial of one Mrs. A. Schuman in praise of "Duffy's Pure Malt Whiskey." The picture of plaintiff and her son illustrating the advertisement had written beneath it the words, "Mrs. A. Schuman." The words of the alleged testimonial were as follows: "After years of constant use of your pure malt whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling' and once that Duffy's is within their reach it is used always. Mrs. A. Schuman, 1576 Mozart street, Chicago, Ill." (16).

Plaintiff is a member of a Christian church in her home town (18), was formerly president of the Ladies' Aid Society and now of the Woman's Aid Society in that church, which is one of the principal churches in Mt. Auburn (19), and alleged in her declaration (6) though not allowed to prove it (18) that she was strongly opposed to the use of whiskey or liquor of any kind. She never had any business with "Duffy's Pure Malt Whiskey" Company, of Rochester, N. Y.; never sent the whiskey company a picture of herself and son and never consented to and had no knowledge of its publication until after it appeared in the newspapers (18). Plaintiff also alleged (6), but was not allowed to prove (18), that she is not and never has been a nurse as is alleged in the advertisement. Plaintiff never lived at 1576 Mozart street, Chicago, and had never heard of Mrs.

Schuman until her own picture was published as that of Mrs. Schuman (14).

The likeness of the plaintiff published by the defendant in the whiskey advertisement was recognized by many people, and caused her great distress and humiliation (19, 21, 22).

The plaintiff offered to show who called the attention of her son to her picture in the paper and this was denied (22). Another witness who had known Mrs. Peck and her family and children for twelve years and lived next door to her was asked what effect or impression was made upon the witness at the time she saw the picture of the plaintiff in the advertisement and this was not permitted (23).

Specification of Errors Relied Upon.

1. The Court of Appeals committed error in affirming the judgment of the Circuit Court of the United States (44).

2. The Circuit Court of the United States erred in giving the following instruction to the jury: "The court instructs the jury to find the defendant not guilty" (24).

3. The Circuit Court erred in refusing to permit the plaintiff to prove by the witness Elizabeth Peck and in sustaining an objection to the following question on behalf of plaintiff: "Mrs. Peck, the article read in evidence states that you are a nurse, is that true?" (18).

(Objected to. Objection sustained. Plaintiff excepts.)

4. The Circuit Court erred in refusing to permit the plaintiff to prove by the witness Elizabeth Peck and in sustaining an objection to the following question on the part of the plaintiff: "Plaintiff was asked the question whether or not it was true that she was accustomed to the use of Duffy's Pure Malt Whiskey" (18).

(Defendant objects. Objection sustained. Plaintiff excepts.)

5. The Circuit Court erred in refusing to permit the plaintiff to prove by the witness Mark Peck in sustaining an objection to the following question on behalf of the plaintiff: "Is handed paper and asked if he has seen the picture there before." Answers "Yes, I saw it at school." "Q. Who called your attention to it?" (22).

(Defendant objects. Objection sustained. Plaintiff excepts.)

6. The Circuit Court erred in refusing to permit the plaintiff to prove by the witness Mrs. Peterson and in sustaining an objection to the following question on behalf of plaintiff. The witness having answered that the paper containing the advertisement had been seen by her at home and that she had recognized the picture in the advertisement to be Mrs. Peck, was asked: "Q. What effect or impression did it give you at the time you saw this picture in the paper?" (23).

(Defendant objects. Objection sustained. Plaintiff excepts.)

BRIEF OF ARGUMENT.

The Right to Privacy.

I.

DEFENDANT'S USE OF PLAINTIFF'S PORTRAIT FOR ADVERTISING PURPOSES WITHOUT HER CONSENT IS AN UNWARRANTABLE INVASION OF HER RIGHT TO PRIVACY.

Discussed *infra*, p. 12.

A. It is a constitutional right.

Consti. Ill., Art. II, Sec. 20, Bill of Rights.

Secs. 1, 2, 6 and 19 also.

Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S., 616, 627 to 629, 630, 635.

B. Name is property, why not face?

Brown Chemical Co. v. *Meyer*, 139 U. S., 540, 544.

C. Privacy considered and distinctions drawn.

Mr. Justice Brown in 34 Am. Law Rev., 321, 329.

Edison v. *Edison Polyform Mfg. Co.*, 67 Atl. Rep., 392, 394.

Judge Dill in *Vanderbilt* v. *Mitchell*, 67 Atl. Rep., 97, 100.

Judge Gray dissenting in *Roberson* v. *Rochester Folding Box Company*, 171 N. Y., 538, 563 to 565.

Pavesich v. *Ins. Co.*, 122 Ga., 190, 194.

Corliss v. *Walker*, 64 Fed., 280, 282.

Itzkovitch v. *Whitaker*, 115 La., 479.

"Right of Privacy," IV Harv. Law Rev., 193.

Prince Albert v. *Strange*, 2 De Gex & Sm., 652, 689-699.

Schuyler v. *Curtis*, 147 N. Y., 434, 442.

Marks v. *Jaffa*, 26 N. Y. Supp., 908.

Atkinson v. *Doherty*, 121 Mich., 372.

Odgers L. & S., 1st Am. Ed., 17.

39 Am. Law Rev., 37, 53-54.

D. Novelty no objection.

Pasley v. *Freeman*, 3 T. R., 51, 63.

Lord Camden in *Dufour* v. *Perraro*, 2nd Hargrave's Juridical Arguments, 304 to 311.

S. C., 1 Dick., 419.

E. Property right.

James Wilson's Works, Vol. 2, 310 to 311.

Webb v. *Portland Mfg. Co.*, 3rd Sumn., 189, 192.

Pollard v. *Photograph Co.*, Law Rep. 40 Chy. Div., 345, 353 to 354.

Note to *Parsich Case*, 2 Am. & Eng. Ann. Cs., 574 to 576.

Van Horne's Lessee v. *Dorrance*, 2 Dall., 304, 310.

F. Roman and French law.

Sir Frederick Pollock on Torts, 233.
Sir Frederick Pollock on Torts, 2.

Morey's Outlines of Roman Law, 220.

De Rep., 3-22.

Ulpian—Morey's Outlines of Roman Law, 220.

Loi relative a la Presse, 11 Mai., 1868; 31 Bulletin Des Lois, 399.

Cooper's Notes on Justinian, 636.

Libel.

II.

THE ARTICLE DECLARED UPON WAS LIBELOUS AND ACTIONABLE PER SE.

Discussed *infra*, p. 36.

Review of picture cases held libelous.

Morrison v. *Smith*, 177 N. Y., 366, 368.

Paresich v. *New Eng. Life Ins. Co.*, 122 Ga., 190.

De Sando v. *N. Y. Herald Co.*, 85 N. Y. Supp., 111.

Farley v. *Evening Chronicle Pub. Co.*, 113 Mo. App., 216, 223.

Rose Ball v. *The Tribune*, 123 Ill. App., 235.

Wandt v. *Hearst Chicago American*, 129 Wis., 419, 421-2.

Sheibley v. *Ashton*, 130 Ia., 195, 197, 200.

Words must be construed in their ordinary meaning.

Peake v. *Oldham*, Cowper's Rep., 275, 278.

Woolnoth v. *Meadows*, 5 East., 463, 473.

Erskine's Speeches, Vol. 2, p. 91.

A. *The publication which imputes to a person language known to those among whom she lives to contain false statements is libelous.*

Libel defined.

White v. *Nicholls et al.*, 3 How., 439, 449, 450.

Odger L. & S., Ed. from 2nd Eng. Ed., 293.

Effect of pleading general issue.

Sheahan v. *Collins*, 20 Ill., 325.

To charge a person with being a liar is libelous *per se.*

Prewitt v. *Wilson*, 128 Ia., 198.
Hake v. *Brames*, 95 Ind., 161.
Monson v. *Lathrop*, 96 Wis., 386.
Lindley v. *Horton*, 27 Conn., 58.

B. *It is the province of the jury to decide under proper instructions from the court whether the article was libelous.*

Culmer v. *Canby*, 101 Fed., 195, 197.
Pfitzinger v. *Dubs*, 64 Fed., 696.
Townshend v. *S.* & *L.* (4th Ed.), 576.
McDonald v. *Woodruff et al.*, 2 Dill., 244.

C. *A witness may be asked what impression the alleged libelous words made upon him.*

Specification of Errors, 6th.
Nelson v. *Borchenius*, 52 Ill., 236, 238.
Chiatovitch v. *Hanchett*, 96 Fed. Rep., 681, 686.

D. *Introduction of a libelous article in evidence and proof of publication establishes the cause of action.*

Kraus v. *The Sentinel Co.*, 60 Wis., 425, 430.

E. *Even though the libel does not name the person injured it is sufficient if it can be shown that it refers to him.*

This is discussed under subdivision III, *infra.*

III.

EVIDENCE OF FALSITY OF DEFAMATORY MATTER MAY BE OFFERED TO ENHANCE DAMAGES EVEN THOUGH THE FALSITY OF THE PUBLICATION IS ADMITTED BY THE PLEADINGS.

Discussed *infra*, p. 48.

Specifications of Error 3 and 4.
Evidence of Elizabeth Peck (Rec., 18).

A. *Though plea of general issue admits falsity as to words of publication, plaintiff may nevertheless prove that words are false as to her when her name is not mentioned in the publication.*

Alliance Rer. Pub. Co. v. *Valentine*, 9th C. C. Rep. (Ohio), 387; 6 Ohio C. Dec., 323.

B. *Though plaintiff's name not mentioned, still the words of the publication may clearly refer to the plaintiff.*

Pavesich v. *New Eng. Life Ins. Co.*, 122 Ga., 190.

Barron v. *Smith*, 19 So. Dak., 50, 54.

Morrison v. *Smith*, 177 N. Y., 366.

Palmer v. *Bennett*, 31 N. Y. Supp., 567.

IV.

EVIDENCE SHOWING ACTUAL DAMAGE SHOULD BE ADMITTED.

Discussed *infra*, p. 52.

Specification of Error 5.
Evidence of Mark Peck (Rec., 22).

V.

MISTAKE IS NO EXCUSE FOR THE PUBLICATION OF A LIBEL AS SUGGESTED BY THE OPINION IN THE COURT OF APPEALS.

Discussed *infra*, p. 53.

A. *The alleged mistake in this case was an unwarranted assumption of a fact not proved.* (20, 43-44.)

B. *Even if proved is no excuse for publishing libel.*

Mr. Justice Holmes in *Hanson* v. *Globe Newspaper*, 159 Mass., 293, 299, 301.

Rex v. *Woodfall*, Lofts Rep., 776, 782, Lord Mansfield.

Mr. Justice Story in *Dexter* v. *Speare*, 4th Mason. 115, 117.

Judge Taft in *Post Publishing Co.* v. *Hallam*, 59 Fed., 530, 536.

Clark v. *North American Co.*, 203 Pa. St., 346, 351.

Ransom v. *McCurley*, 140 Ill., 626, 636-637.

C. *But if offered in mitigation of damages must be pleaded.*

Fenstermaker v. *Tribune*, 35 Law Rep Ann., 611, 615.

ARGUMENT.

I.

Right to Privacy.

"A **frequent recurrence** to the **fundamental principles** of civil government is absolutely necessary to preserve the blessings of **liberty.**"

Const. Illinois, Art. II, Sec. 20, Bill of Rights.

Personal liberty, the right to maintain inviolate **ones own body,** no court is bold enough or technical enough to deny. But when a learned court in one of the leading commonwealths of the land gravely concludes that an accurate cast or **representation** of **a portion** of a **woman's body,** and that the most sacred and cherished part, **her face**; can be without her consent paraded and exhibited before the eyes of the public in a newspaper without remedy in the courts; and when the Court of Appeals in this case has intimated that the right to forbid the act exists (43) and yet decides that the right to punish by a judgment for damages does not (43-44); it is time to recur to **fundamental principles** and ascertain whether to preserve the "blessings of liberty" does not require the courts to hold that if a "**man's name is his own property**" as this court has decided, his **face** is also.

Brown Chemical Co. v. *Meyer,* 139 U. S., 540, 544.

When we recur to fundamental principles, which are not stated differently in the Constitution of Illi-

nois from other states of this Union, we find in the Preamble that "the people * * * in order to form a more perfect government, establish justice * * * and secure the blessings of liberty" ordained the constitution which declares that,

> "All men are by nature free and independent, and have certain inherent and inalienable rights —among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property governments are instituted among men, deriving their just powers from the consent of the governed." Art. II, Sec. 1.

Then are enumerated the following rights:

> "No person shall be deprived of life, liberty or property without due process of law." Art. II, Sec. 2.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; * * *" Art. II, Sec. 6.

And finally it is declared that:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; * * *." Art. II, Sec. 19.

Has the liberty or property or reputation of the plaintiff been violated; has she been deprived of either? Has she been secure in her person, has she found a certain remedy in the laws as administered by the Court of Appeals for the injury and wrong which she has received in her person, property and reputation by the exploitation of her face in a whisky advertisement which puts into her mouth several

base lies and leads people who know her to think she has loaned or sold her face and name in a way that no self-respecting person would have consented to do?

Mr. Justice Brown in 34 Am. Law Rev., 321, 329.

Vice Chancellor Stevens in *Edison* v. *Edison Polyform Mfg. Co.*, 67 Atl. Rep., 392, 394.

Judge Dill in *Vanderbilt* v. *Mitchell*, 67 Atl. Rep., 97, 100.

Judge Gray dissenting in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y., 538, 563-565.

Mr. Justice Cobb in *Pavesich* v. *Ins. Co.*, 122 Ga., 190, 194.

Judge Colt in *Corliss* v. *Walker*, 64 Fed. 280, 282.

Itzkovitch v. *Whitaker*, 115 La., 479, 480.

In *Boyd* v. *United States*, 116 U. S., 616, the language of Lord Camden, quoted with approval from pages 627 to 629, declared with reference to a man's papers that:

> "They are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection, and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

Is not a woman's face as dear to her as her papers and shall it be displayed before the eyes of people against her will and without remedy?

It has been urged in argument that if it is unlawful to publish a person's face, then it is unlawful to

publish the name of anyone under any and all circumstances, for to publish the likeness of a person is no more of an offense than to publish his name. We cannot agree with that argument. Is there nothing hallowed about the "human face divine"? Shall it be classed with the few poor letters made of lifeless ink? Is there no sanctity about that reflex of the divine image? Would Menelaus have consented that this doctrine should have been applied to the face of his ravished Helen?

> "Is this the face that launched a thousand ships
> And burnt the topless towers of Ilium?
> Sweet Helen, make me immortal with a kiss."

After referring at length to Lord Camden's views, Mr. Justice Bradley proceeds to say, page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right to personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, —it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In the case at bar the action of the government is not complained of, but the principles, as Mr. Justice Bradley says, "reach farther" than the person

who for the moment may have invaded these sacred rights. The remarks by Mr. Justice Bradley on page 635 with reference to mild and stealthy encroachments upon the liberty and property rights of citizens, and the duty of courts to be watchful of the rights of the citizen apply with equal force, we submit, to encroachment by private persons and public authorities.

Two answers are made to the plaintiff's claim. One is that made by Chief Justice Parker in the *Roberson* case, that the plaintiff has no property in her name and that her liberty and her reputation cannot be protected from the assault made upon them by the publication in question. The other answer is the *de minimis* answer made by the Court of Appeals, which usurps the province of the jury and permits the court to decide the amount of damages which should be allowed; fixes those damages at a nominal sum and turns the plaintiff out of court.

Is the right to privacy so easily disposed of?

A. *An action for the invasion of the right to privacy is not novel.*

The sentiment in favor of the right to privacy had its first substantial expression in this country in 1890 during which year there appeared in Scribner's Magazine for July an article entitled "The Rights of the Citizen to His Reputation," by E. L. Godkin, Esq., an extended discussion on the "Right to Privacy," in IV Harv. L. R., 193, by Samuel D. Warren and Louis D. Brandeis, and the case of *Manola v. Stevens* (not reported), in which the Supreme Court of New York enjoined the defendant

from making and issuing photographs surreptitiously taken of the plaintiff.

In *Schuyler* v. *Curtis*, 15 N. Y. Supp., 787 (1891), the relatives of Mrs. George Schuyler, then deceased, secured an injunction restraining the defendant from proceeding with a project to make and exhibit a statue of the deceased, the court holding that the granting of an injunction is not limited to a case where damages could be recovered at law. In 1895 this case came before the New York Court of Appeals and the judgment was reversed on the ground that no right to privacy survives so that it can be enforced by relatives. 147 N. Y., 434. But the remarks of Mr. Justice Peckham, then a member of that court and delivering the opinion, do not seem to indicate a view of this subject contrary to the principle recognized by this court in the *Meyer* case.

In 1893, in *Marks* v. *Jaffa*, 26 N. Y. Supp., 908, an injunction was granted by the Superior Court of New York City to restrain the publication of a picture of the plaintiff in the defendant's newspaper with an invitation to the readers of the paper to vote on the question of the popularity of the plaintiff as compared with another person whose picture was also published in such paper. Judge McAdams in the opinion said:

> "No newspaper or institution, no matter how worthy, has the right to use the name or picture of any one for such a purpose without his consent."

In 1899 the Supreme Court of Michigan held that an action brought by a widow to restrain the defendant from using the name and picture of her de-

ceased husband on cigar labels could not be sustained. This case went no farther than *Schuyler* v. *Curtis*, in holding that the right to privacy does not survive to the relatives of the deceased.

Atkinson v. *Doherty*, 121 Mich., 372.

Meanwhile, in 1893, the United States Circuit Court in Massachusetts heard a suit brought by the widow and children of George H. Corliss to enjoin the defendant publishers from printing and selling a biographical sketch of Corliss and from printing and selling his picture in connection therewith. The first part of the prayer was denied. The court held that the deceased was a world-wide and public character and having become such, had waived all right to privacy. The latter part of the prayer was granted and the defendant enjoined from printing and selling the picture of Corliss. The decision was placed upon the ground that the defendant had not complied with the condition under which the picture had been obtained and also because the complainants had the exclusive right of property in the photograph and to permit the defendant to use it would be a "violation of confidence" "or a breach of contract between the parties." *Corliss* v. *Walker*, 57 Fed., 434. In the following year the case came before Judge Colt upon a motion to dissolve the injunction. It now appeared that defendant had purchased the picture of Corliss at an Artists' Studio and had not, as it appeared upon the first hearing, obtained it from Mrs. Corliss, the widow, upon certain conditions there alleged by the complainants to have been violated by the defendant, consequently the case assumed an entirely different aspect. In deciding the case Judge

Colt distinguishes between the public citizen and the private person, holding that the former had surrendered or dedicated to the public the right to reproduce his picture. As to private individuals the court held that such person "*has a right to be protected in the representation of his portrait in any form. That this is a property as well as a personal right;* and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures, delivered by a teacher to his class, or the revelation of the contents of a merchant's book by a clerk." He further said (280):

> "The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. *A private individual should be protected against the publication of any portraiture of himself*, but where an individual becomes a public character the case is different."
>
> *Corliss* v. *Walker*, 64 Fed., 280, 282.

It should be kept in mind that in all of the cases so far noticed except *Manola* v. *Stevens* the action was not brought by the person whose right to privacy was invaded, but by survivors, relatives and friends of deceased persons.

In 1901 Miss Roberson brought an action against The Rochester Box Company to restrain the defendant from using her picture as an advertisement. The court gave her a judgment holding that if a property right was necessary to entitle her to maintain the action, the case might stand upon the right of property which every one has in his own body. *Roberson* v. *Folding Box Company*, 71 N. Y. Supp., 876. The

case was carried to the Court of Appeals in 1902 and the judgment was reversed. 171 N. Y., 538. Judge Gray, with whom two associate justices concurred, filed a dissenting opinion.

One of the most interesting cases is that of Otto Pavesich, an artist residing in Atlanta, who discovered that the defendant was using his likeness for advertising purposes. He sued the company for damages on a count for the invasion of the right to privacy and a count in libel. A demurrer was sustained to the petition and plaintiff carried his case to the Supreme Court of Georgia. In an unusually able and exhaustive opinion Mr. Justice Cobb, speaking for the united court of seven judges, upheld the right to privacy.

Pavesich v. *New Eng. Life*, 122 Ga., 190.

The criticism most to be urged against *Roberson* v. *Rochester Folding Box Co.* is that there was in fact a sufficient property right involved to warrant its recognition and protection by the court. Property today must be considered to include more than mere physical objects, even rights in themselves intangible may be regarded as property.

Odgers L. & S., 1st Am. Ed., 17.

The National Corporation Rep., Oct. 9, 1902, Vol. 25, page 183, says that "not only in the secular press but in legal journals the disapproval of the court's action has been very pronounced." "So far as our observation has gone every comment upon the decision except that of Mr. Elbridge Adams, referred to below, has been adverse." Elbridge Adams, who was counsel for defendant in the case, afterwards

contributed an article to the American Law Review in which he of course upheld the position which the Court of Appeals had taken, but it is interesting to notice that Mr. Adams, after endorsing the recommendation of the New York court that a statute be enacted prohibiting the publication of a person's portrait for business purposes without his consent, goes further than the court and advocates the passing of a statute against the publication of any living person's portrait other than an officeholder, a candidate for office or one who has voluntarily courted or submitted to publicity.

39 Am. Law Rev., pp. 37, 53, 54.

In 1899 California passed a law forbidding the publication of the portrait of any living person, a resident of the state other than one holding public office in the state, without the written consent of the person first being obtained.

In April, 1903, the State of New York passed a similar law.

B. *But if action were novel that is not sufficient ground to deny the right.*

The decision of *Pavesich* v. *The New England Life* shows conclusively that no new laws are needed.

The case is a landmark on the subject of the invasion of the right to privacy and libel, and so exhaustive that it may be said to amount to a treatise on the subjects discussed. It shows a most careful examination of the whole field of argument. It is fair, finished and profound and there is nothing like it for learning in the books on this subject. It assails Mr. Justice Parker's position and shows that

it is untenable. The *Roberson* case halted on account of the novelty of the question involved. It was new, therefore not to be recognized.

The same argument which the New York Court of Appeals makes, was urged against the recognition of the then new action of "Deceit" in the celebrated case of *Pasley* v. *Freeman* (1789), 3 T. R., 51, in which case Ashurst, J., at page 63, made the following observation:

> "Where cases are new in their principle, there, I admit, it is necessary to have recourse to legislative interposition; in order to remedy the grievance, but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, *it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them.*"

For centuries it has been the boast and the glory of the common law, that it was capable of meeting the demands of every age and every condition. And Lord Camden so declared in his marvelously luminous judgment in *Dufour* v. *Perraro*, 2 Hargrave's Juridical Arguments, 304-311; s. c., 1 Dick., 419. It was this quality that distinguished it from all other systems. It was founded, in reason, it was flexible, it was alive, its principles could be applied to meet all the varied conditions that arise in a complex civilization. Principle and not precedent governed its application. Only let the wrong appear, and the remedy was at hand. Has the common law ceased to have vitality?

C. *Defendant without plaintiff's consent had no more right to display her features in a public newspaper than it would have had to exhibit her person.*

There was no right of property involved! Character, reputation, is not property, says the New York court! It could not restrain the defendant from using a beautiful woman's portrait for advertising purposes, whereby the defendant made money (property), because the portrait of the woman was not property. The use of the portrait sought to be restrained was not property, but the defendant which was using the portrait was making money (property) out of the use of it. It is indeed strange logic. A nuisance may be restrained, a noisome odor, a cesspool, a livery stable, an abattoir, noises that disturb the rest and quiet of the citizen complaining, but a woman whose portrait is used against her will for business and mercenary purposes has no relief in equity. The portrait may adorn the walls of saloons and all kinds of disreputable resorts, but she has no grounds for complaint because there is no property right involved! This is the logic of the Roberson decision.

James Wilson, signer of the Declaration of Independence, member of the Constitutional Convention, framer of the Act concerning the judiciary in our constitution, member of the Pennsylvania Convention called to adopt the constitution, Associate justice of this court and founder of the first law school in the United States, did not take this view of character. Hear what the greatest jurist of the Colonial period says on this subject:

"To his character everyone has a natural right. * * * Under some aspects, character may be considered as a species of property; but of all, the nearest, the dearest and the most interesting. * * * Well may character then be considered as one of the natural rights of man; well may it be classed among those rights, the enjoyment of which it is the design of good government and laws to secure and enlarge."

James Wilson's Works, Vol. 2, p. 310-311.

What is property? At the last analysis, it is nothing but a right. The right to a thing, to use it, and to dispose of it. He who has the right to anything, to control it, to use it, to dispose of it, has the right of property. He has property in fact, no matter of what kind or character it may be; whether it be a right to fish a certain stream, to hunt a certain forest, to plough a certain field, or to live beneath a certain roof. Higher and nearer and dearer than any of these rights is the natural right a man has in his own form and features. Over his own person he exercises supreme control. He may remain quiet at home or he may go abroad. He may choose the crowded street or the solitude of the forest. He may transport himself at will. He may carry his dominion over his own person so far as to sell his poor remains to a medical society. He may go through life in a sequestered manner or he may seek fame and honor, public notice and popular applause. If he choose he may have his portrait in public prints, or he may refuse to sit for his picture throughout his entire life. These are his natural inherent rights. These are his properties, his possessions. No man may seize him and carry

him to prison without cause, no man may deprive him of his liberty without just occasion.

The officer of the law, or a private person detaining him unlawfully for the briefest period becomes liable thereby for false imprisonment. The imprisonment may be but technical, theoretical, nevertheless, the man has been deprived of his liberty and his right of action against the party detaining him is complete. Such are the safeguards of our law, such is the price we set upon our liberty.

Does liberty cease with the physical man or does it extend to the spiritual as well? Does it extend to that part of man which most signally identifies him with his Creator? Can "the best, the nearest and dearest part," as James Wilson calls it, be trafficked in, and the victim possess no remedy?

"I have," says Mr. Justice Story, "*considered it laid up among the very elements of the common law that wherever there is wrong there is a remedy to redress it;* and that every injury imports damage in the nature of it. * * * The law tolerates no further inquiry than whether there has been the violation of a right."

Webb v. *Portland Mfg. Co.*, 3 Sum., 189, 192.

D. *Reputation is property.*

It is so declared by the leading authority on the law of libel: "Every man," says Odgers, "has the right to be protected from defamation as much as from assault or bodily harm. His reputation is his property and if possible more valuable than other property."

Odgers, L. & S., 1st Am. Ed., p. 17.

"Taken with its strict sense, it denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing."

2 Austin's Juris., 4th Ed., 1873, 817-818.

The *Pavesich* case, *supra*, takes the same position. The language of Mr. Justice Gray, who wrote the dissenting opinion in the *Roberson* case is adopted and approved by the Georgia court, at page 215:

> "I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions. * * * Any other principle of decision is, in my opinion, as repugnant to equity as it is shocking to reason."

Such is the opinion of Mr. Justice Cobb and six other Judges composing the Georgia court. The difficulty which Mr. Justice Parker met with in not finding any adjudicated cases squarely on the subject no longer exists. The question is no longer novel. In unmistakable terms the Georgia court has shown that there is redress at common law for the unwarranted use of a person's portrait for advertising purposes.

Mr. Justice Brown, a former member of this court, also thought so when in an address before the New York Bar Association he said:

> "The publication of individual likenesses, * * * is equally an invasion of one's right to privacy. * * * But if a man may appear in public or seclude himself, as he sees fit, there is no sound reason why he should not determine the circumstances under which his face shall be exhibited in the newspapers."

34 Am. Law Rev., 321, 329.

Vice Chancellor Stevens suggested that "it is difficult to understand why the peculiar cast of one's features is not also one's property and why its pecuniary value if it has one does not belong to its owner rather than to the person seeking to make an unauthorized use of it," if it is true as this court has held in *Brown Chemical Company* v. *Meyer*, 139 U. S., 540, 541, that "a man's name is his own property and he has the same right to its use and enjoyment as he has to that of any other species of property." *Edison* v. *Edison Polyform Manufacturing Co.*, 67 Atl. Rep., 392, 394. And Judge Dill of the Court of Errors and Appeals of New Jersey, speaking of the *Roberson* case, said it is "seldom cited but to be disapproved."

Vanderbilt v. *Mitchell*, 67 Atl. Rep., 97, 100.

The vigorous dissenting opinion by Judge Gray in the *Roberson* case, 171 N. Y., 557 at 561, contains a striking passage which indicates a true conception of the basis of the right to privacy which is that this right is "the complement of the right to the immunity of one's person."

Even a criminal arrested and charged with crime was held by the Supreme Court of Louisiana entitled before conviction for the crime to prevent the display of his photograph in the rogues' gallery. *Itzkovitch* v. *Whitaker*, 115 La., 479, and Lord North in *Pollard* v. *Photographic Company*, L. R., 40; Chy. Div., 345, 353-354, supposed that there could be no question but that a person would be entitled to damages under such circumstances.

An interesting note to the *Pavesich* case is found in 2 Am. & Eng. Ann. Cas., 574 to 576, and the refer-

ence there to the law and custom of India applied to privacy in family life is worthy of notice.

If character is property it is the duty of the courts to protect it, no matter in what form or manner it may be assailed.

> "The right of acquiring, possessing and protecting property is natural, inherent and inalienable."
>
> Van Horne's *Lessee* v. *Dorrance*, 2 Dall., U. S., 304, 310.

> "Reputation and honor," says Sir Frederick Pollock, "are no less precious to a good man than bodily safety and freedom. In some cases they may be dearer than life itself. Thus it is needful for the peace and well being of a civilized commonwealth that law should protect the reputation as well as the person of its citizens."
>
> Sir Frederick Pollock on Torts (6th Ed.), p. 233.

What does reputation do for a man? What rights, privileges or immunities does it procure for him aside from the satisfaction it may give his vanity or self-esteem?

It gives him the comfort of knowing his neighbors think well of him.

It gives to the vast majority of men the chief reason for loving life.

A disgraced man is an exiled man, marooned even amidst a sea of humanity.

Reputation gives weight to a man's opinion.

A man of good reputation is listened to, a man of bad reputation is neglected or scorned.

Influence follows power, whether it come from wealth or office, but it is tremendously increased by

belief in a man's sincerity, and often survives the loss of fortune and of place.

Reputation takes the place of capital in business and trade.

Every man whose character is held in high estimation can always command more credit than his visible means warrant. That this is true, is a matter of observation that may be made any day.

It is as much the duty of the state to provide security for reputation as for any other kind of property, a man's regard for his reputation being one of the chief guaranties of social order and progress; and this is the modern and civilized view.

"A lie makes its way across lots, while truth has to go round by the dirt road."

Rochefoucauld said: "We take a secret pleasure in the misfortunes of our friends." It is admitted to be true.

Privacy is a distinctly modern product. The savage cannot have it and has no desire for it.

The Indian dwelling in tents and wigwams was utterly ignorant of privacy.

Even the men who were our not remote ancestors knew little or nothing of privacy.

Many of the houses of Thanes and Franklins possessed but one room.

To have a house of one's own is the ambition of nearly all civilized men and women. And the reason is civilized men desire and love privacy.

"Who steals my purse steals trash,
'Tis mine, 'tis his, it has been foe to thousands,
But he who filches from me my good name
Takes that which not enriches him, but makes
me poor indeed."

This is but the poetic expression of all men, savage or civilized, that ever existed; that a man's social standing was the particular kind of property most necessary to his enjoyment of life, the loss of which would greatly impair if not destroy the satisfaction derivable from all other kinds.

The famous dictum of Coke, "A man's house is his castle, *et domus sua cuique tutissimum refugium*," is but the expression in terms of politics of the value attached by the race to the power of drawing the line each man for himself, between his life as an individual and his life as a citizen, or in other words, the power of deciding how much or how little the community shall see of him or know him beyond what is necessary for the proper discharge of all his duties to his neighbors and to the state.

Accordingly, the right to decide how much knowledge of his own doings and affairs and those of his family, the public shall have, is as much one of man's natural rights as his right to decide how he shall eat and drink, what he shall wear, or how he shall spend his leisure hours. These rights are the grounds of personal dignity and personal pride; the fine flower of any civilization.

The Supreme Court of Louisiana in the *Whitaker* case, *supra*, which arose upon an application for an injunction to restrain defendants from placing plaintiff's picture in the rogues' gallery, said:

> "There is a right in equity to protect a person's picture from such an invasion of private rights. *Everyone who does not violate the law can insist upon being let alone. In such a case the right to privacy is absolute.*"
>
> *Itzkovitch* v. *Whitaker*, 115 La., 479.

The Roman View.

To do no injury to another was the Roman law as set down by Ulpian in the institutes of Justinian:

> *"Juris praecepta sunt haec; honeste vivere alterum non laedere, suum cuique tribuere."*
>
> Sir Frederick Pollock on Torts, p. 2.

Shall Rome, just emerging from heathenism, be more just to its citizens than a modern republic, enlightened by more than a thousand years of Christian civilization?

Is it "living honestly" to permit another to make money, to enrich himself by making merchandise of the portrait of this plaintiff? Is it "rendering to every man his due" to allow the defendant in this action to be a party to such a transaction and come off free?

Were the stoic philosophers and jurists of pagan Rome more humane, more enlightened than men who teach and administer the law today? Shall the disciples of Marcus Aurelius instruct the disciples of Christ in humanity, justice and right?

> *"Justitiam namquam colimus et boni et aequi notitiam profitemur; aequm ab iniquo separantes, illicitum et illicita discernentes."*
>
> Ulpian Cooper's Justinian.

Is it nourishing justice to deny the plaintiff's right of action in this case? Is it separating the just from the unjust to refuse her claim for redress?

> The Roman jurists declared, *"Jurisprudentia est justi atque injusti scientia." "Jus est ars boni et aequi."*
>
> Morey's Outlines of Roman Law, p. 220.

And Cicero declared that "Law was right reason conformable to nature. * * * It is not one thing at Rome and another at Athens; one thing today and another thing tomorrow, but in all times and nations this universal law must forever reign eternal and imperishable."

De Rep., 3, 22.

Morey's Outlines of Roman Law, *supra*.

The right to privacy is "conformable to right reason." No other view of the case at bar than an admission of plaintiff's right could meet the high moral standard of the pagan orator's philosophy. The right to privacy is founded in reason, justice and liberty.

"Justitia est constans et perpetua voluntas jus suum cuique tribuendi."

Ulpian—Morey's Outlines of Roman Law, p. 220.

With this aim in view the right to privacy will be recognized by the courts. To deny it is to declare that the fountain of justice is no longer free or that her springs have dried up.

It is to be observed that the right to privacy is strictly upheld in France, where the civil law prevails.

"Toute publication dans écrit periodique relative a un fait de la vie privée constitue une contravention punie d' une amende de cinq cents francs."

Loi relative *a la Presse*, 11 Mai., 1868; 31 Bulletin Des Lois, 399.

The Liberty of the Press.

Speaking on the liberty of the press Mr. Justice Brown used the language referred to, *supra:*

> "The publication of individual likenesses or snap-shots taken perhaps at embarrassing moments *is equally an invasion of one's right to privacy.* * * * If a man may appear in public or seclude himself, as he sees fit, there is no sound reason why he should not determine the circumstances under which his face shall be exhibited in the newspapers."

This view is in harmony with the opinion of Judge Colt in *Corliss* v. *Walker* and with *Paresich* v. *The Ins. Co.*

The right to privacy in no way encroaches upon or curtails the constitutional guaranty of the liberty of free speech and a free press to the individual.

The right to privacy does not assail the liberty of the press, but fortifies it by purging it of its iniquities.

It does not limit its rightful power, but curtails the power to abuse that right when it traduces the character of innocent people. It does not push forward the frontier of human freedom, but repels the assault on human liberty. It enters on the conquest of no new territory, but sets up its lawful sovereignty over territory long ago acquired. It makes no innovation on established rules or principles, but makes clear the rules and principles upon which the right of the individual rest. It declares no schism in the law whatever, but unites and solidifies the eternal and imperishable principles of right, on which all law and justice are founded. It is not an innovation, but a

restoration, not the creation of the present, but the reaffirmation of a right "laid up among the very elements of the common law."

The right to privacy is a real right. It is not founded on whim or caprice, not on fancied or imagined wrongs, but on actual and existing evils that threaten and imperil the peace and happiness of every citizen.

It is not a dream of theorists, pamphleteers and publicists, but the assertion of a claim and a demand for justice by every self-respecting person.

The right to privacy simply asserts "The right to be let alone."

It makes no harsh or imperious demands difficult or impossible to accomplish. It prescribes no line of action, or course of conduct for the press that amounts to censorship or the shadow of it. It is the claim of the individual to go forward on his way through this world undisturbed and unmolested by any one. Its claims are the dictates of reason and the essence of human liberty. The liberty of the press is not involved. Its purpose is to cleanse the stream of its pollution and not to stop the flow of its waters. License never created either justice or liberty, but has been repeatedly the cause for the overthrow and loss of both. Recklessness in the use of a right or privilege has often brought the user trouble, while the right or the privilege remained unimpaired. The bounds of human freedom were never enlarged or the liberty of the race enhanced by assailing the character of virtuous and innocent people. *To be forever pilloried in the files of the defendant newspaper as a self-confessed liar, is not a contribu-*

tion to the freedom of the press, but a sacrifice to its license, greed and tyranny.

> *"The only way to preserve the liberty of the press is to punish it for its prostitution."*
>
> Cooper's Notes on Justinian, 636.

On this branch of the case we conclude.

A. Defendant's use of plaintiff's portrait for advertising purposes without her consent constitutes an unwarrantable invasion of her right to privacy for which an action will lie.

B. Reputation is property.

C. The publication of plaintiff's portrait for advertising purposes by the defendant was in violation of the state constitution guaranteeing personal liberty to the individual.

D. An action for the invasion of right to privacy is not novel.

E. And even if it were this would be no sufficient grounds for denying this.

F. That the right to privacy is derived from the Roman Law, Natural Law, and recognized by Municipal Law as well as judges in decided cases.

G. The form and features of the plaintiff are her own. The defendant had no more authority to display them in public for advertising purposes than it would have had to compel plaintiff to place herself on exhibition for this purpose.

II.

THE ARTICLE DECLARED UPON WAS LIBELOUS, AND ACTIONABLE, PER SE.

A. *Review of picture cases held libelous.*

The cases of *Morrison* v. *Smith*, 177 N. Y., 368, and *Pavesich* v. *New England Life Ins. Co.*, 122 Ga., 190, have been discussed. As to the libelous character of the article in question they are clearly in point and both alike sustain the plaintiff's contention in this case.

De Sando v. *The New York Herald Co.*, 85 N. Y. Supp., 111, came before the Supreme Court of New York a short time before the *Morrison* case. The Herald Co. published a story about an Italian bandit, one Musolino, and to illustrate the story used the picture of the plaintiff De Sando and not that of Musolino. De Sando brought suit for libel and Mr. Justice O'Brien, at page 112, in deciding the case said: "*The article is concededly libelous,*" adding, "*We think it would be a reflection upon the law if it were powerless to afford some remedy for such grievous wrong.*"

Farley v. *The Evening Chronicle Pub. Co.*, 113 Mo. App., 216, 223, was heard in the St. Louis Court of Appeals. An article published concerning a person whose name was the same as plaintiff's, declared him to be a foe of labor organizations. Attached to the article was printed a picture of plaintiff and the words, "Boss James Farley," beneath it.

Plaintiff was not the strikebreaker referred to in the article and his picture had been secured for use in another connection. Mr. Justice Goode held that

the article was libelous regardless of the mistake of the editor.

In *Rose Ball* v. *The Tribune*, 123 Ill. App., 235, the defendant published plaintiff's picture in connection with the story of a girl who had committed suicide. Mr. Justice SMITH in deciding the case said: "We are of the opinion that if it applied to plaintiff and was untrue it was libelous." And again, "Whether or not the article referred to the plaintiff * * * was a question of fact for the jury."

Wandt v. *Hearst's Chicago American* in the Supreme Court of Wisconsin, was this: The newspaper published a suicide story and used plaintiff's picture to illustrate it. The article was held libelous and the judgment recovered by the plaintiff affirmed. Justice WINSLOW in deciding the case said, at page 421:

> "*The insertion of the picture under the headline of the article is of course in effect a statement that it is a picture of the person referred to in the article.*"

In answer to the contention—that persons who knew the plaintiff well, her residence and family, would at once conclude that the picture was inserted by mistake, the court said:

> "There may well be a considerable number of persons who only knew the plaintiff by sight or have merely a slight acquaintance, who would recognize the picture and conclude that the article in fact did refer to plaintiff, concluding (if they knew the plaintiff's name at all) *that such name was merely another alias.*"
>
> *Wandt* v. *Hearst's Chicago American*, 129 Wis., 419, 421-2.

Even the *Roberson* case on this point of libel is in favor of the plaintiff. Mr. Justice Parker there said:

> "I do not say that, even under the existing law, in every case of the character of the one before us, *or indeed in this one*, a party whose picture is circulated against his will is without remedy. * * * There are many articles, especially of medicine, whose character is such that using the picture of a person, *particularly that of a woman*, in connection with the advertisement of those articles might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published."

The publication in question clearly falls within the lines indicated by Justice PARKER, and the trial court committed error in directing a verdict for defendant.

Ball v. *Evening Amer.*, 237 Ill., 592, is also a picture case held to be libelous.

B. *Words must be construed in their ordinary meaning.*

Nowhere is the rule of interpretation more clearly set forth than in the following language by Mr. Justice BISHOP, one of the most brilliant of Judges formerly of the Supreme Court of Iowa:

> "It was Shakespeare who said: 'A jest's prosperity lies in the ear of him who hears it,' and just so it is of libel and slander. So that we should not indulge in any critical refinements to discover the intent of the writer, nor too carefully scan the language to see if there is not some technical view which will sustain the defendant's contention. * * * *Courts will not strain to find an innocent meaning of the language used.*"
>
> *Sheibley* v. *Ashton*, 130 Ia., 195, 197, 200.

Lord Mansfield said:

> *"A court ought not to be industrious in putting a construction upon words different from what they bear in their common acceptation and meaning."*
>
> *Peake* v. *Oldham*, Cowper's Rep., 275, 278.

In *Woolnoth* v. *Meadows*, 5 East., 463, 473, Le Blanc, J., said:

> *"It is not sufficient to show by argument that the words will admit of some other meaning*, but the court must understand them as all mankind would understand them, and we cannot understand them differently in court from what they would do out of court."

It is also to be observed that the publication must be considered entire, and not a part of it—as Lord Kenyon pointed out in his charge to the jury in the *King* v. *Stockdale* in these words:

> "But let me on the other side warn you that though there may be much good writing, good argument, morality and humanity in many parts of it, yet if there are offensive passages, *the good part will not sanctify the bad part.*"
>
> Erskine's Speeches, Vol. 2, p. 91.

It was good and fair, humane and honorable on its face to say of the plaintiff that she "goes out nursing patients" if it had been true; but it was a **lie!** It was high praise if true that she was "one of Chicago's most capable and experienced nurses" but that also was a **lie;** and her friends and neighbors knew these words of commendation were false; and the fair words "will not sanctify" their sinister meaning when applied to Mrs. Peck!

C. *Libel defined.*

Mr. Justice Daniel, speaking for this court, gave a clear definition of libel:

> "Every publication, either by writing, printing or *pictures* which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or *odious* or *ridiculous* is *prima facie* a libel and implies malice in the author and publisher towards the person concerning whom such publication is made."
>
> *White* v. *Nicholls et al.*, 3 How., 439, 449, 450.

Does the article declared upon fall within this definition? If it does it is actionable and recovery may be had without proof of special or actual damage.

Odgers L. & S., Ed. from 2nd Eng. Ed., 293.

The article charged plaintiff with "years of constant use of your Pure Malt Whiskey." It also declared that plaintiff was a "nurse" and that she as "nurse" "recommended it, as the very best tonic and stimulant." Were these words or any of them calculated to make plaintiff "infamous, odious or ridiculous?"

That they were is apparent on their face.

It must be recalled that by pleading the general issue defendant admitted that the plaintiff was innocent of the charge and that "its falsehood stands admitted by the parties."

Sheehan v. *Collins*, 20 Ill., 326.

The effect and meaning of the article were to "put into the mouth of the plaintiff" all the words of the

alleged testimonial. As the record stands it shows that plaintiff had never had any "business with Duffy's Pure Malt Whiskey Company," and that she never sent "a picture of herself or son" to the whiskey people. (18.)

So, then the charge as to the "constant use of Duffy's whiskey for years." The recommending to others as "the very best tonic and stimulant" and the statement that she is a "nurse" are, upon the pleadings, admittedly false. The facts here find their exact parallel in *Pavesich* v. *The New England Life Ins. Co., supra.* The language of the Supreme Court of Georgia at page 221, is so clear and pertinent on this point that it admits of no contention:

> "It is alleged that the plaintiff did not have and never had, a policy of insurance with the defendant company, and that this fact was known to his friends and acquaintances. In the light of these allegations, *the words attributed to the plaintiff become absolutely false*, and those who are acquainted with the facts, upon reading the statement, would naturally ask, for what purpose was this falsehood written? It was either gratuitous, or it was for a consideration; and whichever conclusion might be reached, the person to whom the words were attributed would become contemptible in the mind of the reader. *He would become at once a self-confessed liar. If he lied gratuitously he would receive and merit the contempt of all persons having a correct conception of moral principles. If he lied for a consideration he would become odious to every decent individual.* It seems clear to us that a jury could find from the facts alleged that the publication in the light of the extrinsic facts, was libelous and the plaintiff was entitled to have this question submitted to a jury."

In the case at bar the natural inquiry at once would be: "How did Mrs. Peck's picture come to be published with this whiskey advertisement? Did she sell her picture to the whiskey people for a price and was she so cowardly as to use another's name and not her own to designate the picture?" Or, "did Mrs. Peck just give her picture to the whiskey people for the good of humanity and the benefit of the public that the public might know the beneficent effects of Duffy's Whiskey?" "But if she gave her picture away why did she not subscribe it with her own name?"

Again they would ask, "Why does Mrs. Peck call herself a 'nurse'?" "We know her to be nothing of the kind." "Why does Mrs. Peck recommend the use of whiskey?" "We always understood and believed her to be a temperance woman and opposed to liquor." These are some of the natural questions that "those who were acquainted with the facts" would ask upon reading the advertisement. In any and every instance it would render the plaintiff odious and contemptible in the eyes of the reader.

D. *To charge one with being a liar is actionable per se.*

To openly confess to the world that one is a liar manifests such utter shamelessness on the part of the person making such confession that it could not fail to draw upon such person the odium, ridicule and contempt of all self-respecting people. The fair and reasonable interpretation of such an act, as plaintiff is represented as doing in this case, is this and only this—that she had sold her picture to the whiskey people and was too mean and cowardly to

admit the fact, hiding or attempting to hide her shamelessness and utter want of honor under the name of another person.

Other authorities support the rule that to charge a person with being a liar is a libel *per se*.

Prewitt v. *Wilson*, 128 Ia., 198.
Hake v. *Brames*, 95 Ind., 161.
Monson v. *Lathrop*, 96 Wis., 386.
Lindley v. *Horton*, 27 Conn., 58.

Now if it be libelous to publish of another that he is a liar, is it not equally libelous to put words into the mouth of another that makes him confess he is a liar? Not only confess it, but openly and brazenly "glory in his shame." The alleged testimonial in the case at bar makes the plaintiff not only confess that she is a liar, but makes her act a lie as well—passing herself off on the public as another person; endeavoring by the poorest kind of subterfuge to change her identity by giving herself another person's name.

The publication of the plaintiff's picture in connection with the advertisement was in effect an announcement by the plaintiff: "This is my picture; I do not wish it to be known so I shall sign another name to it. I know I am doing something disreputable but I need the money." "It was the rule of HOLT, Chief Justice, to make words actionable whenever they *sound to the disreputation* of the person of whom they are spoken; and this was also HALE'S and TWISDEN'S rule and I think it a very good rule," said Mr. Justice FORTESCUE, chancellor in the Court of King's Bench, during the reign of George the Fourth, in deciding *Button* v. *Heyward*, 8 Mod. R.,

25. Did the publication in question "*sound to the disreputation*" of the plaintiff? To this question there can be only one answer. It is incapable of any other construction:

Does it "*sound to the disreputation*" of a modest and refined woman, the mother of two young men (18), that she "pays an eloquent tribute to Duffy's Pure Malt Whiskey"? For, according to this publication, she has not only used whiskey for years, but desires the fact to be known and blazoned to the world. If the defendant had taken plaintiff bodily by force and exhibited her in some museum or shooting gallery with a placard hung about her neck bearing the legend: "I have used Duffy's Pure Malt Whiskey constantly for years and recommend its use to the public," would this exhibition "*sound to the disreputation*" of the plaintiff? Yet this in effect is actually what was done by the defendant, and the wrong in the one case no greater than in the other.

Pavesich v. *New Eng. Life Ins. Co., supra.*

E. *It is the province of the jury to decide under proper instructions from the court whether the article was libelous.*

The court instructed the jury to find the defendant not guilty (24), and under the second specification of errors this court is asked to reconsider that action. Such an instruction should never be given if there is any evidence, however slight, to support the action. Mr. Justice Day, when a member of the Court of Appeals, said in *Culmer* v. *Canby,* 101 Federal, 195, 197, that:

> "If * * * the words * * * are capable of a construction which would make them

> actionable, * * * it is for the jury to determine, under all the circumstances, * * * in what sense they were used."

Judge Bunn declared in *Pfitzinger* v. *Dubs*, 64 Fed., 696, that:

> "It is only where the words are incapable of a construction injurious to the plaintiff's character, that the court is justified in taking the case from the jury."
>
> Townshend's S. & L. (4th Ed.), 576.

The "words" in the article sued upon are not only *capable* of a construction injurious to the plaintiff but are *incapable* of any other.

The true rule and correct method of procedure is clearly stated by Mr. Justice DILLON in *McDonald* v. *Woodruff et al.*, 2 Dill., 244, where this language occurs:

> "At the present day the law in relation to libel is, that the judge is not bound to state to the jury as a matter of law whether the publication complained of and sued for is a libel or not, but the proper course is for him to define what is a libel in point of law and leave it to the jury whether the publication falls within the definition and as incidental to that, whether it is calculated to injure the reputation of the plaintiff."

This is precisely what the trial court should have done in the case at bar and failing so to do committed reversible error.

Mr. Justice DAY further said in *Culmer* v. *Canby* that words are actionable which tend to "lessen the esteem" of society for the man. The Court of Appeals admits that people will think the petitioner has "loaned her face" in a way no "self-respecting"

person would have consented to do. Would not that "lessen the respect" of people for her? Are not respect and esteem the same? Is not the publication which tends to forfeit either a libel? The words and the photograph are also fairly susceptible of the construction that she had not only "loaned" but that she had "sold her face" for a consideration, and either meaning would tend to disgrace her and lay her open to the contempt and ridicule of friends, of neighbors and of strangers.

F. *A person who saw the alleged libelous publication may testify what impression the words made upon him.*

This question was propounded to Mrs. Peterson (23) and she was not allowed to answer; and the sixth specification of errors raises the correctness of that ruling.

The witness was one of those who saw plaintiff's picture in the defendant newspaper and recognized it. (23.) She represented a large class and could have told the "effect or impression", of the article, upon her own mind when she read it, how she understood it at the time and consequently the evidence should have gone to the jury. "A libel is to be construed as the world generally understands it."

Nelson v. *Borchenius,* 52 Ill., 236, 238.

Chiatovich v. *Hanchett,* 96 Fed. Rep., 681, 686.

G. *Introduction of the libelous article in evidence, and proof of publication, establishes a cause of action.*

All the necessary elements of libel are fully set forth in the declaration. The entire article com-

plained of, except the plaintiff's picture, is set out in the declaration. The article itself, picture and printed words was attached to the declaration and by reference made a part of it. (4-9.) Plaintiff's picture is distinctly referred to and the picture in the article printed and published as the picture of Mrs. A. Schuman is declared to be the picture of the plaintiff.

It requires but a glance to see that the article complained of, is *libelous per se*. The declaration charges that the

> "effect and meaning of said publication are to charge the plaintiff with the use of whiskey and to publish the same to the world, and to allege and publish of and concerning the plaintiff that she has used Duffy's Malt Whiskey constantly for years and to proclaim to the world that she has been and is a nurse and has and does recommend the use of whiskey to the public." (7.)

The declaration also states that plaintiff is not a nurse and denies that she ever used "Duffy's Pure Malt Whiskey," but on the contrary that she is and always has been a non-user and abstainer from whiskey and all spirituous liquors. (7.)

Every material allegation of the declaration was proved upon the trial, the publication of the article as charged in the declaration (15), and the application to the plaintiff. (15, 22, 23.)

The article being libelous *per se*, proof of injury was unnecessary.

> "The introduction of the article as evidence and proof of publication would establish a cause of action against the appellant."
>
> *Kraus* v. *The Sentinel Company*, 60 Wis., p. 425, 430.

III.

EVIDENCE OF FALSITY OF DEFAMATORY MATTER MAY BE OFFERED TO ENHANCE DAMAGES EVEN THOUGH THE FALSITY OF THE PUBLICATION IS ADMITTED BY THE PLEADINGS.

A. *Plaintiff may show that words of the publication are false as to her even though plea of the general issue technically admits their falsity.*

The declaration alleges that the meaning of certain words in the publication were: First, that the plaintiff had used "Duffy's Malt Whiskey constantly for years" and, second, that its effect also was "to proclaim to the world that she has been and is a nurse." She offered to show that both statements were false and the evidence was excluded and the error is preserved and relied upon in the specifications of error 3 and 4.

Neither the picture nor the text of the publication complained of contained the name of the plaintiff Mrs. Peck, but did contain that of Mrs. Schuman.

The defendant claims therefore that the words of the publication do not refer to plaintiff because her name is not mentioned. The next logical claim is that therefore the plea of the general issue does not admit that the words were false as to the plaintiff.

The plea does admit, so the defendant says, that the words were false as to the person whose name was mentioned. The law is that though the plaintiff's name is not mentioned the publication may clearly refer to the plaintiff. If this be true then the logic of the defendant's argument is unsound; but to show its unsoundness and clearly show to the jury that the words are false as to the plaintiff, may

she not testify specifically and positively that as to her the words are false?

The two questions asked of her (18): "Is it true that you are a nurse?" and "are you accustomed to the use of Duffy's Pure Malt Whiskey" she should have been allowed to answer and the refusal was error.

B. *Though plaintiff's name not mentioned still the words of the publication may clearly refer to the plaintiff.*

The theory of the court seemed to be that inasmuch as the plaintiff was not named, the article did not refer to her and she could not deny the words. That although by the article they were put into her mouth, they were under the name of another person.

Plaintiff's picture was wrongfully published in an advertisement, but his name was not mentioned, and the Supreme Court of Georgia said:

> "It was, so far as his friends and acquaintances were concerned, the same as if his name had been signed to the printed words."
>
> *Pavesich* v. *New Eng. Life Ins. Co.*, 122 Ga., 190.

> "There is no merit, therefore, in the contention that the plaintiff was not specifically named in the article. But whether or not the article referred to the plaintiff is a question for the jury."
>
> *Barron* v. *Smith*, 19 So. Dak., 50, 54.

The difficulty, if there be any, is entirely cleared away by the case of *Morrison* v. *Smith*, 177 N. Y.,

366. The defendant published in Ainslee's Magazine, an advertisement containing the following words and figures:

> "Illustrated new book. Up-to-date. The experience of a giddy typewriter girl in New York. Typewritten. Good is no name for it. Sent in plain wrappers. Postpaid on receipt of 25c in silver or stamps. Dell Book Co., 119 Flournoy street, Chicago."

Accompanying these words and completing the advertisement was the picture of a young woman and this picture was the likeness of the plaintiff. Upon the trial the plaintiff was permitted to show that she was not in fact a typewriter, but was an actress.

In the case of *Palmer* v. *Bennett*, 31 N. Y. Supp., 567, a tramp by the name of Edward E. Palmer was arrested and taken to the police station. The defendant's newspaper in describing the event gave the correct name but an account that applied to another man, Thomas Palmer, a respectable citizen. Thomas Palmer brought suit and recovered judgment. The case was appealed and the court of review said:

> "The first point * * * is that the libel did not refer to the plaintiff, but to Edward E. Palmer, the person arrested. * * * We do not understand the defendant to contend that it was necessary that the plaintiff should have been named, or that it was not sufficient that the description or references in the libel should identify him. *That such is not the law is well settled.* But his claim is that the article was published of the prisoner, Edward E. Palmer, and that of him the libelous article was true. In a sense this is correct. The article was published of that Palmer, the prisoner, *but it does not follow that*

it might not reflect upon others. If false, it contained a libel on Edward E. Palmer, because of the charge of his vagrancy and arrest. But when the article charged the identify of the plaintiff and Edward E. Palmer, there was then a libel upon the former. If it is affirmed that A and B are the same person, and that B has committed an offense, it is thereby necessarily affirmed that A has committed the offense. If A and B are in fact different persons and the charge made is false as to both, then there is a libel on each; if false as to either, then there is a libel on the one who is innocent."

These authorities establish that the plaintiff may show that although her name was not mentioned, still the publication referred to her. She then ought to be permitted to testify that the defamatory words of the publication, though they might be true of another person, for instance the very person whose name was used in connection with the picture as might be possible, are false as to the plaintiff.

> "The plaintiff in a libel suit may prove the falsity of the defamatory matter published, though no justification is pleaded, and the falsity is therefore admitted."
>
> *Alliance Review Publishing Company* v. *Valentine*, 9 Ohio Cir. Ct. Rep., 387; 6 Ohio Cir. Dec., 323.

The ruling in effect denied the plaintiff the right to prove the allegations in the declaration. She could have shown the gross falsehood of the allegation in the article that she was "one of Chicago's most capable and experienced nurses" (6), and "after years of constant use of your pure malt whiskey, both by myself and as given in my capacity as

nurse, I have no hesitation in recommending it." (5, 9.)

Whether a publication is libelous often depends upon its falsity. In this case it was just as competent to prove the falsity of the reading part of the libelous article as it was to prove the falsity of the pictorial part of the article. The article was a unit, an entity; it could not be separated. It was wholly false both as to the reading or printed words of the article as well as to the picture of the plaintiff. The plaintiff was allowed to prove and did prove that the picture part of the article was false in purporting to be that of Mrs. A. Schuman, and she should have been allowed to prove that the words which the printed article put into her mouth were false likewise.

IV.

EVIDENCE SHOWING ACTUAL DAMAGE SHOULD BE ADMITTED.

That the friends, neighbors, acquaintances and even strangers saw the publication containing the plaintiff's picture and called the attention of the plaintiff or members of her family to the fact, would tend to show actual damage, and such evidence is always proper in a libel case.

Specification of Error 5 complains that the question asked of the plaintiff's son, Mark Peck, was ruled as improper. His picture was published in connection with that of his mother, and he saw it at school. (22.) The witness should have been permitted to show who called his attention there to the picture of his mother and himself in this whiskey advertisement, and the natural inference is that his

schoolmates called his attention to it, and that both he and his mother were the subject of unfavorable and perhaps taunting remarks by them! Such evidence would have shown *actual* damage.

V.

MISTAKE IS NO EXCUSE FOR LIBEL.

A. *The alleged mistake in this case was an unwarranted assumption of a fact not proved.*

The Court of Appeals assumed a fact not pleaded and not proved. Then proceeding upon that assumption announced an erroneous principle, and made it the basis of its extraordinary conclusion that the court and not the jury should fix plaintiff's damages in a case of libel. It was only a step and an easy one then to determine that Mrs. Peck was entitled to nothing more than nominal damages for a wrong which even the court itself admitted might lead people to think that "she had loaned her face and perhaps her name in a way that a self-respecting person would not have consented to do." (43-44.)

The assumed fact grew out of the cross examination of the plaintiff Mrs. Peck (20) when she was asked the following question:

> "Q. You know, of course, Mrs. Peck, that so far as the Tribune is concerned the publication of your picture, if it was your picture, was a mistake, that they had no knowledge whatever of the fact that it was your picture."
>
> (Plaintiff objects; objection overruled; plaintiff excepted.)

This is as far as counsel went. The question was never answered. It was not pressed nor repeated.

Upon this unsubstantial foundation the Court of Appeals based its denial of plaintiff's right to relief!

B. *Even if proved is no excuse for publishing libel.*

It is at best the excuse of one who shuts his eyes and blindly does an act which injures another. The assumed distinction between one who knowingly conceives and one who ignorantly executes a wrong of this nature, never was the law.

Mr. Justice HOLMES, when sitting in the Supreme Judicial Court of Massachusetts, pointed this out in his dissenting opinion in *Hanson* v. *Globe Newspaper Co.*, 159 Mass., 293, 299, 301.

Counsel for defendant in *Rex* v. *Woodfall*, Lofts, 776, 782, raised the same point, saying his client was innocent of wrong inasmuch as he was in prison at the time of the offense and could have had no knowledge of the publication. But Lord MANSFIELD remarked that it would not do, saying:

> "Whenever a man publishes, he publishes at his peril, for there is no entering into the secret thoughts of a man's heart."

That great American judge, JOSEPH STORY, speaking on the same subject, said:

> "No man can protect himself from responsibility for a libel by pleading his ignorance of the real parties who are attacked, if he knows the publication to be libelous. *He is bound not to do a wrong to another whether* personally known or unknown to him. Indeed malice is so far from being disproved by showing that the printer did not know who were the parties libeled, that it often aggravates the malignity of the case by

showing a wanton and indiscriminate malice and an indifference to the peace of the innocent."

Dexter v. *Spear*, 4 Mason, 115, 117.

The alleged testimonial of Mrs. A. Schuman purported to come from 1576 Mozart street in Chicago and it would have been an easy matter for defendant to have verified the picture, but it did not choose to do so, taking its chances to disturb the "peace of the innocent."

Judge TAFT, speaking for the Court of Appeals, on this subject of the "reckless indifference" of the press, said:

> "It is well settled that reckless indifference to the rights of others is equivalent to the intentional violation of them."
>
> *Post Pub. Co.* v. *Hallam*, 59 Fed., 530, 536.

There is no such thing as "accidental" or "mistaken" libel, no more than there is "accidental" burglary or murder.

The question of intent to injure does not occupy the same position in the law of libel as it does in other offenses. As was said in a recent Pennsylvania case:

> "It is very seldom that any personal malice or intent to injure is the purpose of the publication. *The damage that newspapers do and the outrages they commit arise from their reckless disregard of private rights.*"
>
> *Clark* v. *The North American Co.*, 203 Pa. St., 346, 351.

On this same subject the Supreme Court of Illinois has spoken to the same end.

"Willful disregard of the rights of others and the welfare of society is more dangerous and reprehensible than actual malice."

Ransom v. *McCurley*, 140 Ill., 626, 636, 637.

If the Tribune Company "had no knowledge whatever of the fact that it was plaintiff's picture," it *should* have had such knowledge before it gave the advertisement a place in its columns and sent it broadcast over the world. It was not a "piece of news." There was no crying demand for such a publication, the defendant could have ascertained the truth concerning the picture by a simple and efficient method. The defendant did not do so, and it is now too late to set up the plea of accident or mistake. Such an excuse does not exist in the law of libel.

C. *But if offered in mitigation of damages must be pleaded.*

The question complained of was nothing more than an attempt to mitigate the damages, but it was not proper for this or any purpose. Defendant had filed no plea in justification or mitigation, but the general issue only.

"Plaintiff is entitled to know the character of the proof to be offered, either in justification or in mitigation, and the answer must specifically point it out."

Fenstermaker v. *Tribune*, 35 L. R. A., 611, 615.

Conclusion on Libel.

By every principle of the law of libel this cause should have been submitted to a jury for its verdict.

Conclusion on Right to Privacy.

The right to **privacy is not novel.** It was recognized years ago in England in the case of *Prince Albert* v. *Strange*, 2 De Gex & Sm., 652, where an action in equity was brought to restrain defendant from printing a catalogue of the private sketches of Prince Albert and his consort. It was distinctly said that while the bill technically rested upon a right of property in the complainants, it was in fact a "right of privacy" and not a right of property that was involved.

The right to privacy is today established: "New occasions teach new duties—the old order changeth, giving place to new." If the cases are not numerous it is not because the right did not exist, but because the occasion for asserting it had not arisen. The eternal and imperishable rule of right reason that Cicero speaks of was not dead, but only awaited an occasion to call it forth.

That rule of right reason has been and ever will be found coextensive with every possible variety of human transactions. Justice and equity have not perished from the earth. The law, like the fabled seed sown by Cadmus, may lie long quiescent, but when its own time arrives it will awake to life full armed, ready to repel the invader of its domain. That law will never retire from the advanced position which it now occupies. It will guard and pro-

tect the whole frontier of human rights. If the press with all its skill and daring seeks to break through the serried ranks of Justice it will meet with steady and determined resistance. The liberty of the individual shall not fall a sacrifice to the frenzied zeal of modern journalism.

The human face was not meant to be bandied and "blown about the pendent world." It is like precious jewels in a casket. If the owner wishes to bring them forth to charm and dazzle the world it is his privilege to do so; if he choose to keep them safe hidden away from all curious eyes it is likewise his privilege so to use them. There is a limit beyond which the public may not go. There is an enchanted circle which vulgar feet may not profane.

The right to privacy like that flaming angel that forever guards the gates of Paradise stands sentinel over every private citizen and says to all the world, "Thus far thou shalt go and no farther. Buy, sell and get gain, traffic and trade, how you will, but you may not along with your wares and merchandise, your pills, Perunas and Duffy whiskies, print and sell without consent the portraits of private persons to assist you in your business."

We respectfully urge that the trial court committed reversible error in directing a verdict in this case and again renew our request that the judgment be reversed and the cause remanded for a new trial.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Counsel for Petitioner.

Chicago, April, 1909.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 191.

ELIZABETH PECK, PETITIONER,

vs.

THE TRIBUNE COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

RUFUS S. SIMMONS,
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SUPREME COURT OF THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

One page 8, Respondent's Brief, occurs this statement: "The only standard by which this can be decided is the enlightened judgment of mankind, as expressed in the laws of the land, and in the judgment of the courts." Our reply is that the judgments of the courts are that publications of the kind in question should be submitted to a jury. Culmer *v.* Canby, 101 Fed., 195, cited on our original brief. Again, on the same page, counsel state: "Manifestly such a contention is against the judgment of mankind." This is not the proper test. The question is not whether such a publication would subject the petitioner to the contempt and ridicule of all mankind, but whether such a publication would subject her to contempt and ridicule. On this same page

counsel state: "It is not a crime to use whiskey as a medicine or to recommend its use as such." That may all be true, and the publication be none the less libelous. It is no "crime to be a presumptuous literary freak." It is, however, libelous to publish an account describing the literary idiosyncrasies of another, so that the effect of the article is to "represent him as a presumptuous literary freak" (Triggs *v.* The Sun, 179 N. Y., 144, 153). It is no crime that one should be "of unsound mind, and in consequence was removed from position as professor in a scientific school." It is, however, libelous to falsely publish this of any one (Totten *v.* The Sun, 109 Fed., 289). It is not a crime at common law to commit suicide. It is, however, libelous to falsely publish this of another (Cady *v.* The Brooklyn Press, 51 N. Y. Suppl., 198). (This case contains an excellent statement of the difference between slander and libel.) See also Wandt *v.* Hearst's American, 129 Wis., 419.

With reference to the Iowa case cited on page 9, Respondent's Brief, this may be said: That was an action for slander, and has no application to the case at bar. The following cases show the attitude of the Supreme Court of Iowa in respect to *libel:* Johnson *v.* Damm, 127 Ia., 555 (opinion by McClain, J.); Morse *v.* The Times, 124 Ia., 707; Prewitt *v.* Wilson, 128 Iowa, 198; Sheibley *v.* Ashton, 130 Iowa, 195 (last two cases cited on our original brief, 38, 43). Broughton *v.* McGrew, 39 Fed., 672 (Respondent's Brief, 10), was a case of slander. The words declared upon in that case were spoken in a stockholders' meeting, and the question of privilege was asserted by the defendant. It will be difficult at this late day to reduce libel to the level of slander. It has maintained its place in the law too long. If there is a case in all the books deciding that it is not libelous to accuse a woman in a printed publication of "drunkenness" it has never fallen to us to meet with it.

Stone *v.* Cooper (Respondent's Brief, 11) was reversed because, as Chancellor Walworth said, "The declaration is

entirely silent as to the nature of the controversy," etc. In short, the action failed because of a defect in the declaration.

The Goldberger case, cited on the same page, possesses no value in considering the case at bar. The court in that case says there is nothing in the publication which reflects on the "moral or social character of the plaintiff." The publication in the case at bar *does* reflect on the "moral and social character" of the plaintiff, because it represents her as a cheap and common liar, who has loaned or sold her face for advertising purposes and publishes to the world that "she has used whiskey constantly for years" and "recommends its use to the public." The court in the Goldberger case says: "The publication was at most only a 'sneer at plaintiff.'" In the case at bar the publication was more than a "sneer." It was a blow; a direct assault upon her character.

Walker *v.* The Tribune (Respondent's Brief, 13) has no application here. The case failed because of defective pleading, the plaintiff having omitted proper averments in his declaration; besides, the failure was only temporary, as the order of the court was that plaintiff have twenty days to amend.

Lord Kenyon's remarks in the Holt case (Respondent's Brief, 14) likewise have no application, for that was slander and not libel.

With reference to Pollard *v.* Lyon, that also was slander, and Mr. Justice Clifford was careful to point out the difference. "There is," said he, "a marked distinction between slander and libel, in that many things are actionable when written or printed and published which would not be actionable if merely spoken" (p. 228). Mr. Justice Daniel also pointed this out very clearly in White *v.* Nicholls.

On page 16, Respondent's Brief, it is said: "The publication of the name as much violates the alleged right of privacy as the publication of one's picture." The wrongful use of a name is often actionable, as is illustrated in trade-name cases, and is brought afresh to our minds in the Vanderbilt and

Edison cases cited on our original brief. A name often possesses great value; faces also possess value, as their indiscriminate and unauthorized use so clearly demonstrates. The very fact of the publication of the petitioner's picture proves that the picture had a commercial value; that it was a "vendible commodity." The Court of Appeals, in substance, says this when it states that the "article shows that people will be led to think that she has loaned her face, and perhaps her name." This language implies value, because people do not lend valueless things; the fact that a thing is loaned implies that the borrower had some use for it, and use that would be to his gain and benefit; the publication also being susceptible to the construction that plaintiff had sold her face to the whiskey people; the facts come straight home to Lord Westbury's decision in McAndrew *v.* Bassett, 10 L. T. (N. S.), 442, where he said, at page 445: "Property in the word for all purposes cannot exist, but property in that word, as applied by way of *stamp* upon a stick of liquorice does exist the moment the liquorice goes into the market so *stamped.*" If a name on a "stick of liquorice" becomes "*property*" so soon as it is "*stamped*" upon it, then why should not the human face become property so soon as it is "*stamped*" in nature's mint? (McAndrew case is cited with approval by Lord Cairns in Maxwell *v.* Hogg, L. R., 2 Ch. App., 307, 314.)

With reference to the Georgia Code being the basis for decision in the Pavesich case, as counsel seem to think, it occurs to us that it is only the crystallization of the common law.

In Chief Justice Parker's decision (Respondent's Brief, 22) this statement occurs: "There is no precedent for such an action to be found in the decisions of this court." If the Chief Justice had looked into Johnson *v.* Girdwood, 28 N. Y. S., 151, 152, he might have read this language: "It is the peculiar merit of the common law that its principles are so flexible and extensive as to comprehend any new wrong that

may be developed by the inexhaustible resources of human depravity." He might have read, also, on page 153, same decision, that "no matter by what means a man is wronged by the injury to his good name or person, for such injury the law awards him redress and retribution." If he had looked into Kujek *v.* Goldman, 150 N. Y., 176, he would have found this statement by Judge Vann (p. 178): "The courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been occasion to make one." If he had looked into the decisions of the Supreme Court of Kentucky he might have found the language of Judge Paynter, in Hundley *v.* The Louisville R. R., 105 Ky., 162, where the court said, at page 164: "Courts are called upon to apply familiar principles to new questions; if none seem applicable, to enunciate a just rule suited to the state of facts before it. * * * *It can never be said that the novelty of a complaint is an objection to the action.*" If he had gone beyond seas into the old English cases he would have found Pasley *v.* Freeman, cited on our original brief. He would also have found Ashby *v.* White, 1 Smith's Lead. Cas., 8th Am. ed., 472-188, where, when objection was made to the action because there was no precedent, Chief Justice Holt said the objection was not good, and that "if the plaintiff has a right, he must of necessity have the means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and, *indeed, it is a vain thing to imagine a right without a remedy.*" When Mr. Justice Parker balked at the action because of its "effect upon future litigation" (Respondent's Brief, 24), he might have been encouraged to go forward by the language of Lord Holt in Ashby *v.* White, *supra*, where the great chief justice said, at page 490, answering the objection that to allow the action would produce litigation: "It is no objection to say that it will occasion multiplicity of actions; *for if men will multiply injuries*

actions must be multiplied too, for every man that is injured ought to have his recompense." It may be noticed here that it was this great decision of Lord Holt's that gave occasion to the first invention of that form of action called action on the case. (Note Ashby *v.* White, *supra*, 494.) In the note to the Ashby case, page 503, the method of determining whether damages have or have not been occasioned is said to be whether "any *rights* existing in the party damnified had been *infringed upon;* for, if so, *infringement* thereof is an injury * * * and the law will presume some damage resulted from it."

Judge Cooley said: "The right to one's person may be said to be a right of complete immunity: to be let alone" (Cooley on Torts, 2d ed., p. 29). On page 30 of the same work the same author says: "The law also gives to every man the right to security in his reputation."

These rights of the petitioner, "the right to security in her reputation" and the right "to be let alone," were "*infringed upon*" by the respondent's unauthorized use of her portrait.

It may be remarked here that the right to contract is "property," and to deprive one of this right is to deprive one of "property" "within the meaning of the Constitution" (Ritchie *v.* The People, 155 Ill., 98, 104). The right to reputation is *jus in rem* (Harris *v.* Minvielle, 48 La. Ann., 908, 914). If one be deprived of this right to reputation, why should it not be held that one is deprived of one's "property" "within the meaning of the Constitution"? In the Ashby case, *supra*, Lord Holt said: "An injury imports a damage when a man is thereby *hindered of his right.*" The petitioner in this case suffered an injury that "imports a damage" in being thrust out of the privacy of her own home and circle of friends and neighbors, to be made the laughing stock of the public, and was "hindered of her right" "to be let alone."

Counsel state (Respondent's Brief, 26) that it is not clear

why the right of privacy is discussed by Judge Dill and Vice-Chancellor Stevens in the New Jersey cases. An examination of those cases discloses an excellent justification for the discussion of the right to privacy. One was for the wrongful use of a name, and the other for the wrongful use of a name and portrait. Both Mr. Justice Dill and Vice-Chancellor Stevens make it very clear that no matter whether there was a *"property right involved"* or not they could not follow Justice Parker's decision, and would not have done so even if no property right had been involved, but would have chosen in any case to follow the Supreme Court of Georgia.

No further reply appearing necessary, we conclude and again request this court to reverse the judgments of the courts below and remand this case for a new trial.

RUFUS S. SIMMONS,
FRANK J. R. MITCHELL,
S. C. IRVING,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

ELIZABETH PECK, *Petitioner,* *vs.* THE TRIBUNE COMPANY, *Respondent,*	No. 191.

BRIEF AND ARGUMENT FOR RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN BARTON PAYNE,
WILLIAM G. BEALE,
Counsel for Respondent.

GUNTHORP—WARREN PRINTING CO., CHICAGO

Nurse and Patients Praise Duffy's

Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of DUFFY'S PURE MALT WHISKEY.

"For that weak, run-down and gone feeling, it is the best tonic and stimulant in the world."

MRS. A. SCHUMAN.

"After years of constant use of your Pure Malt Whiskey both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run down conditions. At least twenty-five families use it in my own neighborhood, and when I go out nursing patients ask me what to take for that 'gone feeling,' and once that Duffy's is within their reach it is used always."—**Mrs. A. Schuman**, 1874 Mozart St., Chicago, Ill.

Duffy's Pure Malt Whiskey

For more than fifty years Duffy's Pure Malt Whiskey has been prescribed by doctors and used in over two thousand leading hospitals as the purest and most powerful tonic-stimulant, invigorator and health-builder known to the medical science. It is endorsed by the clergy and professional nurses and recommended by all schools of medicine as a positive cure for pneumonia, consumption, grip, dyspepsia, indigestion, nervous prostration, all diseases of the throat and lungs, and every form of stomach trouble; malaria, chills, fever, and all run-down, weakened, diseased conditions of the body, brain, mind and muscle. It is a heart tonic, blood purifier and promoter of health and long life; makes the old hearty and young, and keeps the young vigorous and strong. Duffy's Pure Malt Whiskey contains no fusel oil, and is the only whiskey recognized by the government as medicine.

There is but one Duffy's Pure Malt Whiskey. Insist on having the genuine and refuse cheap substitutes and imitations offered by unscrupulous dealers, which are placed on the market for profit only and which are positively harmful to both body and brain. Look for the trade-mark, the "Old Chemist," on the label, and be sure the seal on the bottle is unbroken. Sold in sealed bottles only; never in bulk.

All reliable druggists and grocers, or direct, $1.00 a bottle. Advice and medical booklet free. Duffy's Malt Whiskey Co., Rochester, N. Y.

The petitioner, a widow, resides at Mount Auburn, Iowa (Rec., 14, 19), a town of 300 people in Benton County (Rec., 19). Her family consists of two sons, aged respectively, ten and thirteen years; keeps house; does sewing, and goes out to work; is a member of the Christian Church, and in January, 1906, after the publication in question, was elected president of the Ladies' Aid Society, the principal society of the principal church in the place, and is now president thereof. (Rec., 19.)

On January 31, 1906, she brought this suit, and claims (a) the picture of the woman in the advertisement is her picture, and its publication in connection with the advertisement is libelous *per se;* (b) that her right of privacy was invaded, and she can therefore recover without alleging or proving special damages.

The gravamen of her complaint is the publication of her picture. But the picture is not set out in the declaration.

She charges:

In the first count that the "defendant did wickedly and maliciously compose, print and publish * * * of and concerning the plaintiff * * * a certain false, scandalous, malicious and defamatory libel, in the words and figures following." Then the reading matter of the advertisement, *supra*, is set out. Following this the pleader adopts the novel idea of attaching a copy of the publication to the declaration, and then refers to the picture thus:

> "And plaintiff states that as part of said publication, and following the words 'for that weak, run-down and gone feeling, it is the best tonic and stimulant in the world,' was printed and published

> the picture or likeness of the plaintiff; that said picture or likeness was printed and published by the defendant as being the picture or likeness of one Mrs. A. Schuman, which name was printed below said picture, but plaintiff states that the said picture then and there printed and published, was and is a true and correct picture of plaintiff, and not the picture of Mrs. A. Schuman."

In the second count it is charged (7) that the advertisement published *of and concerning the plaintiff* was false, scandalous, malicious and defamatory, *as the defendant well knew;* and is as to the plaintiff wholly false and libelous.

It will be noted that a *scienter* is here charged. No proof was offered tending to sustain it.

By the third count it is alleged the defendant "invaded the plaintiff's right of privacy, and published plaintiff's picture in its issue of October 22, 1905, as a part of an advertisement containing an alleged testimonial of one Mrs. A. Schuman to the virtues of Duffy's Pure Malt Whiskey."

Can it be that the use, or recommendation by a nurse of a pure whiskey as a medicine, can bring one into scandal, infamy and disgrace? Counsel seem to be conscious of the weakness of their position, and therefore leave out the purpose for which it was used and recommended, that is, as medicine, forgetting that for some hundreds of years it has been settled that in libel or slander one cannot pick out or parcel the words. Lord Coke, 4 Co., 18, said:

> "God forbid that a man's words should by strict and grammatical construction be taken by parcels against the manifest intent of the party upon whom consideration of all the words will import the true cause and occasion which manifest the true sense of them."

At the conclusion of the respondent's evidence the Circuit Court, Bethea, J., held that the advertisement was not libelous *per se*, and in the absence of allegation and proof of special damage petitioner was not entitled to recover, and instructed the jury to return a verdict for respondent. On a writ of error, the Court of Appeals affirmed the judgment, 154 Fed. Rep., 330.

The Questions Presented.

The questions presented are: (a) Is the advertisement—the article and the picture—taken together, libelous *per se?* (b) If the publication is not libelous *per se*, can an action for libel be maintained without alleging and proving special damages because of a violation of an alleged right of privacy?

POINTS.

I.

THE PUBLICATION OF THE ADVERTISEMENT, TOGETHER WITH THE PICTURE OF THE PETITIONER, WAS NOT LIBELOUS PER SE.

White v. *Nicholls*, 3 How., 266.
Pollard v. *Lyon*, 91 U. S., 225.
Commonwealth v. *Clap*, 4 Mass., 168.
Sterling v. *Judgenheimer*, 69 Iowa, 210.
Broughton v. *McGrew*, 39 Fed. Rep., 672.
Stone v. *Cooper*, 2 Denio, 293.
Goldberger v. *Philadelphia Grocer Pub. Co.*, 42 Fed. Rep., 42.
Walker v. *Tribune Co.*, 29 Fed. Rep., 827.

II.

THE ADVERTISEMENT NOT BEING LIBELOUS PER SE, PETITIONER CANNOT MAINTAIN AN ACTION FOR THE PUBLICATION OF HER PICTURE, BECAUSE IT VIOLATES HER ALLEGED RIGHT OF PRIVACY.

Schuyler v. *Curtis*, 147 N. Y., 436.
Roberson v. *Rochester Folding Box Co.*, 171 N. Y., 538; 89 Am. St. Rep., 828, and foot note, p. 844.
Atkinson v. *Doherty*, 121 Mich., 372; 80 Am. St. Rep., 507.
Moser v. *Press Publishing Co.*, 109 N. Y. S., 963.
Owen v. *Partridge*, 82 N. Y. S., 248.

ARGUMENT.

I.

THE PUBLICATION OF THE ADVERTISEMENT, TOGETHER WITH THE PICTURE OF THE PETITIONER, WAS NOT LIBELOUS PER SE.

It has long been established that no action for libel can be maintained unless (a) the publication made of and concerning the plaintiff, was libelous *per se*, (b) or that the alleged libel caused special damages, which were declared upon and sustained by proof.

What constitutes a libel *per se* was defined by this court in *White* v. *Nicholls*, 3 Howard, 266, in the year 1845. Mr. Justice Daniel, gave the following definition of libel, which has stood the test to this day. He said:

> "Every publication, either by writing, printing or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made."

Mr. Justice Story in *Dexter* v. *Spear*, 4 Mason, 115, gave this definition:

> "Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule or hatred, or which accuses him or her of a crime punishable by law, or of an act odious and disgraceful in society, is a libel."

Chief Justice Parsons, in *Commonwealth* v. *Clap*, 4 Mass., 168, gave this definition:

> "A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule."

Th Criminal Code of Illinois, R. S., Chap. 38, par. 321, provides:

> "A libel is a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury."

There is a substantial concurrence in these definitions. The rule announced by this court in 1845 has been in the main followed.

Whether a particular publication falls within these rules must be determined in each case by the matter of the alleged libel. The only standard by which this can be decided is the enlightened judgment of mankind, as expressed in the laws of the land, and in the judgments of the courts.

Here it is claimed that an advertisement is libelous *per se*, which relates to the use and recommendation of Duffy's Pure Malt Whiskey as a medicine for the sick. Manifestly such a contention is against the judgment of mankind.

It is not a crime to use whiskey as a medicine or to recommend its use as such, notwithstanding the fact that there are people who entertain extreme views as

to its use. These, however, are the exceptions and not the rule, and their judgments and opinions do not constitute the judgments and opinions of mankind. This is well illustrated in the following case.

It is well known that in the State of Iowa, where petitioner resides, extreme views are held as to the use of intoxicating liquors, and the petitioner should be willing to be judged by the judgment of the court of last resort in her own state.

In *Sterling* v. *Jugenheimer*, 69 Iowa, 210, an action was brought to recover damages for the publication of alleged slanderous words, charging that the plaintiff went into a saloon and purchased intoxicating liquors in violation of law. A demurrer was interposed. In disposing of this, Reed, J., said:

> "The alleged slanderous publication was to the effect that plaintiff on several occasions went into a saloon and purchased intoxicating liquors; that such liquors were kept by one Donovan with intent to sell the same contrary to law and the sales to the plaintiff were made in violation of law; that plaintiff then and there encouraged, requested, solicited and directed said Donovan to sell said liquors to him, in violation of the statutes of the state.
>
> The grounds of the demurrer were (1) that it was not alleged that plaintiff sustained any special damages in consequence of said publication, and (2) that the words spoken did not impute to the plaintiff the commission of a public offense and are not actionable *per se*. We had occasion in the case of *Wakeman* v. *Chambers* (decided at this term) to consider the question whether the purchaser of retail liquor which is sold in violation of the statute of this state, is an accomplice in the crime committed by the seller. We then held that he could not be regarded as such accomplice. Following that holding the judgment in the present case should be affirmed."

Nor is it actionable *per se* to charge a person with drunkenness.

This was decided by Mr. Justice Woods, lately presiding Justice of the Circuit Court of Appeals for the Seventh Circuit, in *Broughton* v. *McGrew*, 39 Fed., 672. The defendant said of the plaintiff, a railroad official:

> "He has been drunk frequently, and you can't expect his subordinates to remain sober when he furnishes them such an example."

And this:

> "It is generally reported that Broughton is under the influence of liquor half his time. I am reliably informed that he is unfit to do business."

In his charge to the jury Judge Woods said (673):

> "Now, it is not actionable, or slanderous, in the sense of the law, to charge a man generally with being drunk, or being in the habit of getting drunk, or having been drunk. In order that such a charge be actionable it is necessary to couple it with some business in which drunkenness is a disqualification, or tends to constitute incapacity; that is to say, some business in respect to which the charge of drunkenness would tend to injure the party."
> * * *
>
> "The mere charge of drunkenness is not an actionable injury, and is significant in this case, because the injury that you will consider will have reference to the effect of the slander upon the complainant's business and his business prospects, not upon his character as an individual in a community, because in that respect all men are affected alike by an accusation of drunkenness and the law does not recognize as good cause for an except where it affects a man in his business."

In her declaration, petitioner is at some pains to deny that she is a nurse, and that she used or recom-

mended Duffy's Pure Malt Whiskey as a medicine, and charges that the publication, as to her, is false.

It is well settled that not every false charge, even where directly made against a person, is a libel, and unless the matter of the publication is libelous *per se*, no action can be maintained because the matter is false.

In *Stone* v. *Cooper*, 2 Denio, 293, the charge involved the use of certain moneys for Wall street speculation. The Chancellor, Walworth, said:

> "Still, it is not every false charge against an individual, even when the same is deliberately reduced to writing and published to the world which is sufficient to sustain a private action to recover a compensation in damages as for a libel. * * * But the plaintiff must either aver and prove that he has sustained some special damage from the publication of the matter charged against him, or the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character, or business, or in his domestic or social relations, in consequence of the publication of such charge."

What amounts to holding one up to public hatred, contempt or ridicule, has been the subject of judicial decision.

In *Goldberger* v. *Philadelphia Grocer*, 42 Fed., 42, the alleged libel was based upon a publication charging that the presiding officer of a Union was not actuated by patriotism or love for his guild, in obtaining certain subscriptions, but the main spring of his exertions was a *per diem* allowance, it being charged

that he presented a bill for services for such work into this comment:

> "What a pity that the grocers of this city could not find one so unselfish as to do such a work without the hope of gain, giving birth to activity."

Judge Shipman, in sustaining a demurrer, quoted Chancellor Walworth in *Stone* v. *Cooper, supra*, and said (p. 43):

> "There is nothing in the publication of which the plaintiff complains which reflects upon his integrity, upon his business, moral, or social character, or which imputes conduct of a fraudulent or dishonorable kind. It is, however, claimed that the article holds him up to contempt or ridicule, because, although president of the New York Retail Grocers' Union, he obtained subscriptions for the World's Fair from the retail grocers for a small compensation, to be paid by the Union for the time spent in this service. This claim calls for the consideration of the question whether any published sneer or pleasantry which may create a smile at the expense of a plaintiff, but which criticizes his conduct in no important particular, is libelous *per se*."
>
> * * * * *
>
> "This language (opinion of Walworth) virtually says that a sneer in the columns of a newspaper is not sufficient to sustain a private action for damages, when it conveys or insinuates no charge from which a court can infer that the plaintiff has been, or ought to be, degraded in the estimation of the public, and when no special damage is averred. In somewhat the same line of thought it has been held that it is not actionable to publish of a man that he pleaded the statute of limitations against a debt theretofore admitted to be just, *or that he shielded himself against the payment of a debt for liquors by the defense that the sale of liquors was prohibited by statute.*

> * * * The article is a sneer at the plaintiff, but I cannot perceive, special damage not being averred, that it says anything which can properly dishonor or degrade or injure him in the estimation of his acquaintances or the public, or cause him to suffer loss in property, character, business, or in his social relations."

In *Walker* v. *Tribune Company*, 29 Fed., 827, defendant published of a lawyer, author of a *text-book upon the law of patents* and *a pamphlet on a bribery case*, thus:

> "The pamphlet on the Paine Bribery Case and the United States Senate, by Albert H. Walker, is plainly the effusion of a crank."

It was alleged that to characterize the plaintiff a *crank*, was to publicly impute to him qualities, aims, and methods highly inconsistent with his usefulness and success as a lawyer and author, whereby he had been greatly prejudiced in his credit and reputation. A demurrer was interposed.

Judge Blodgett, in the Circuit Court, Northern District of Illinois, said (p. 828):

> "It must, I think be conceded that to call a person a 'crank' is not of itself actionable. It is not a word which, by its common meaning in the English language, imports that a person has been guilty of a crime, or exposes him to hatred, contempt, ridicule, or obloquy, or which would tend to injure him in his trade or profession. The word has no necessary defamatory meaning, and, if it was used by the defendant in a defamatory sense, such a sense must be given it by an appropriate allegation or *innuendo* to that effect. The meaning alleged in the declaration is 'thus to publicly impote to him (plaintiff) sundry qualities, aims, and methods highly inconsistent with usefulness as a lawyer or as an author.' This is

> not enough. *Some opprobrious or defamatory meaning—something which would show* that the expression used would tend to bring the plaintiff into contempt or hatred, or charge him with a criminal offense—is necessary. It is no libel upon a man who has entered the field of authorship to underrate his talents.

Demurrer sustained.

Lord Kenyon, C. J., in *Holt* v. *Scholefield*, 6 T. R., 691, said:

> "Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable. I remember a case here many years ago where the judgment was arrested on information for a libel on some justices in Suffolk, because there was no averment that the libel was of and concerning the justices of Suffolk."

It would seem to be unnecessary to cite further authorities. This court, in *Pollard* v. *Lyon*, 91 U. S., 225, disposed of the question under discussion adversely to petitioner's contention. The plaintiff was charged with being in bed with one Captain Denty, and recovered a verdict for the full amount claimed. On motion in arrest, the court held the words not actionable *per se*, and gave judgment for the defendant. Mr. Justice Clifford delivered the opinion, saying (234):

> "Formulas differing in phraseology have been prescribed by different courts, but the annotators of the leading American cases say that the Supreme Court of the State of New York, in *Broker* v. *Coffin*, appear 'to have reached the true principle applicable to the subject,' and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the person a criminal offense for which the party may

be indicted and punished, even though the offense is not technically denominated infamous, if the charge involves moral turpitude and is such as will affect injuriously the social standing of the party.

Examined in the light of these suggestions and the authorities cited in their support, it is clear that the proposition of the plaintiff that the words alleged are in themselves actionable can not be sustained.

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she 'has been damaged and injured in her name and fame,' and she contends that the averment is sufficient in connection with the words charged to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act and it is undoubtedly true that the plaintiff, in such a case, can recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth. * * *

By special damage in such case is meant pecuniary loss, but it is well settled that the term may also include the loss of substantial hospitality of friends."

II.

THE ADVERTISEMENT, NOT BEING LIBELLOUS PER SE, PETITIONER CANNOT MAINTAIN AN ACTION FOR THE PUBLICATION OF HER PICTURE BECAUSE IT VIOLATES HER ALLEGED RIGHT OF PRIVACY.

We come now to the question whether an action at law can be maintained for a violation of the alleged right of privacy?

Manifestly, the publication of one's picture, or one's name, in connection with libellous matter, is a libel, and whether a picture or name, the rules of law governing action of libel apply. If the matter is not libellous *per se*, then no action can be maintained unless special damages are alleged and proven, whether the publication complained of is that of a name or picture. The publication of the name as much violates the alleged right of privacy as the publication of one's picture; both equally identify the individual.

It seems to be thought that publishing a picture is a new form of libel or violates in an especial way the right of privacy. This is an error. In the old books libel is regarded as a wrong occasioned by language or effigy. Townsend on Slander and Libel, Sec. 22, says:

> "We define slander and libel as wrongs occasioned by language or effigy—that is to say, slander is a wrong occasioned by speech, and libel is a wrong occasioned by writing or effigy."

Webster defines effigy as "The image, likeness or representation of any person or thing."

A number of cases have arisen where injunction was sought to restrain the publication of a picture or writ-

ings, these applications have usually been refused, unless a property right was involved. So far as we know but one action at law has been sustained involving the alleged right of privacy and that case forms the basis for this action.

Pavesich v. *New England Life Insurance Co.*, 122 Ga., 190, an action at law for damages, stands alone, and we believe is without support in principle or precedent. The action was against the Insurance Company, Lumpkin, its agent, and Adams, the photographer, who gave out the photograph, and appears to be based upon the provisions of the Code of Georgia. The newspaper publishing the advertisement was not sued. In the case at bar the newspaper alone was sued.

Thomas B. Lumpkin, general agent of the New England Life Insurance Company at Atlanta, obtained from Adams, the photograph of Pavesich, an artist, and published the same in the Atlanta Constitution, alongside of the likeness of an ill-dressed, sickly-looking person. Under Pavesich's picture was printed, "Do it now. The man who did." Under the other, "Do it while you can. The man who did not." Below, the words, "These pictures tell their own story." Under Pavesich the words, "In my healthy and productive period of life I bought insurance in the New England Life Insurance Company of Boston, Mass., today my family is protected and I am drawing an annual dividend on my paid-up policy, etc." The statements were signed by Lumpkin. Pavesich had made no such statements, and had never had a policy of life insurance. He claimed the publication was malicious, and intended to and did bring him into ridicule, especially with persons who knew he had no insurance; that Adams was

guilty of a breach of confidence in giving the picture to Lumpkin for publication. The sections of the code of Georgia referred to in the opinion are:

> "3807. A tort is a legal wrong committed upon the person or property, independent of contract. (1) A direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case no special cause is necessary to entitle the parties to recover. In the two latter cases such damage is necessary."
>
> "4929. For every right there shall be a remedy and every court having jurisdiction of the one may, if necessary, frame the other."

The case was heard in the Supreme Court of Georgia upon demurrer. Cobb, J., delivered a very lengthy opinion, saying among other things:

> "The question to be determined is whether an individual has a right of privacy which he can enforce which the courts will protect from invasion. It is conceded that prior to 1890 every adjudicated case in this country and in England which might be said to have involved a right of privacy was not based upon the existence of such right, but was founded upon a supposed right of property or breach of trust or confidence or the like; that therefore a claim to a right of privacy independent of a propery or contractual right had up to that time never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the court to proceed with caution, but such absence even for all time is not conclusive as to the existence of the right. In such a case 'although there be no precedent, the common law will judge according to the law of nature and the public good.' Where the case is new in principle the

courts have no authority to give a remedy, no matter how great the grievance, but where the case is only new in instance and the sole question is upon the application of a recognized principle to a new case 'it would be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.' This results from the application of the maxim *ubi jus ibi remedium* which finds expression in our code where it is declared that 'for every right there shall be a remedy and every court having jurisdiction of the one may, if necessary, frame the other.' Civ. Code, Sec. 4929. * * * All will admit that the individual who desires to live a life of seclusion cannot be compelled against his consent to exhibit his person in any public place unless such exhibition is demanded by the law of the land. * * * The right of privacy within certain limits is a right derived from natural law recognized by the principles of municipal law and guaranteed to persons in this State by the Constitutions of the United States and the State of Georgia in those provisions which declare that no person shall be deprived of liberty except by due process of law. * * *

Each person has a liberty of privacy, and every other person has as against him liberty in reference to other matters and the line where these liberties impinge upon each other may in a given case, be hard to define, but that such a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty whatever it may be. * * * It therefore follows from what has been said that a violation of the right of privacy is a direct invasion of the legal right of the individual. It is a tort and it is not necessary that special damage should have occurred from its violation in order to entitle the aggrieved party to recover. Civ. Code, Sec. 3807."

Finally after a somewhat intemperate discussion of the right of privacy, he concludes:

> "The publication, in the light of the extrinsic facts being a libel, the law would infer malice, and it was not necessary to allege that any ridicule actually befell the petitioner, all that was necessary to constitute the publication of the libel being that the statement should be of such a character as had a tendency to bring the plaintiff in contempt or ridicule. The court erred in dismissing the petition."

It may be that this opinion finds support in the sections of the Georgia Code cited by the court, but is not sustained by any decided case.

The right of privacy, as such, first came before a court of last resort in *Schuyler* v. *Curtis*, 147 N. Y., 434. Mr. Justice O'Brien, 15 N. Y. Sup., 877, granted an injunction restraining the making and public exhibition of a statue of Mrs. Mary M. Hamilton Schuyler. In the Court of Appeals the opinion was delivered by Mr. Justice Peckham. The order granting the injunction was reversed.

Peckham, J., said:

> "Briefly described the action is founded upon an alleged violation of what is termed 'the right of privacy.' * * * In order to determine whether there has been a violation of the right, it is necessary to know something about the right itself and its proper limitations. It is not necessary, however, in the view which we take of this case, to attempt to lay down precise and accurate rules, which shall apply to all cases touching this alleged right. If the facts in any case fail to furnish any clear and sure foundation for a reasonable man to claim that any injury has been or would be caused by the action taken or to be taken by the defendant, then we can at least say, in such a case,

that there has not been and can not be any such real mental distress or injury as a court of equity ought to recognize as within judicial relief. For the purpose we have in view it is unnecessary to wholly deny the existence of the right of privacy to which the plaintiff appeals as the foundation of his cause of action. It may be admitted that courts have power in some cases to enjoin the doing of an act where the nature or character of the act itself is well calculated to wound the sensibilities of an individual and where the doing of the act is wholly unjustifiable and is in legal contemplation a wrong, even though the existence of no 'property,' as that term is usually used, is involved in the subject. * * *

While not assuming to decide what this right of privacy is, in all cases, we are quite clear that such a right would be violated by the proposed action of the defendants. The plaintiff's cause of action is, we think, wholly fanciful. The judgment must be reversed."

All concurred with Peckham, J., for reversal except Gray, J., who read for affirmance, basing his dissent chiefly upon *Prince Albert* v. *Strange*, 1 Macn. & G., 47, where the publication of certain etchings made by the Queen and the Prince Consort were enjoined, and some other English cases, all involving property rights.

Then came the case of *Robertson* v. *Rochester Folding Box Company*, 171 N. Y., 538; 89 Am. State Reports, 828:

Defendant circulated 25,000 prints containing plaintiff's photograph, with the words "Flour of the Family," as an advertisement of a brand of flour. Suit was brought for an injunction and for damages. The defendant demurred to the complaint. The Supreme Court (71 N. Y. Sup., 876) overruled the de-

murrer; the case was certified to the Court of Appeals. The opinion was delivered by Mr. Chief Justice Parker:

> "It will be observed that there is no complaint made that plaintiff was libeled by this publication of her protrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize. Such publicity which some find agreeable is to plaintiff very distasteful, and thus, because of defendant's impertinence in using her picture without her consent, for their own business purposes, she has been caused to suffer mental distress. * * *
>
> "There is no precedent for such an action to be found in the decisions of this court; indeed, the learned judge who wrote the very able and interesting opinion in the appellate division said, while upon the threshold of the discussion of the question: 'It may be said that the theory upon which this action is predicated is new, at least in instance if not in principle, and that few precedents can be found to sustain the claim made by the plaintiffs, if indeed it can be said that there are any authoritative cases establishing her right to recover in this action.' Nevertheless, that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a 'right of privacy;' in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law, nor so far as the learning of counsel or the court in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review, Vol. 4, page 193, in an article entitled, 'The Right of Privacy.' The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through

this world, if he wills without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in hand-bills, circulars, catalogues, periodicals or newspapers, and necessarily that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. * * * The principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a protrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances. If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigaton, but in litigation bordering upon the absurd, for the right of privacy once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations, or habits. And were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one as well as the other, invales the right to be absolutely let alone. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief."

The court then reviews the early chancery jurisdic-

tion when the chancellors decided regardless of principle or precedents, and said:

> "So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity."

The court discusses every known authority and concludes that the so-called "right of privacy" has not found an abiding place in our jurisdiction, and cannot be incorporated without doing violence to settled principles of law.

In 1903 New York passed a statute that any person whose name or picture is used for purposes of trade, without his written consent, may restrain the use thereof and recover damages.

Moser v. *Press Publishing Company*, 109 N. Y. S., 963, was a suit brought pursuant to this statute. It was charged that the "World" for the purpose of trade, April 22, 1907, published and circulated in its newspaper a picture of the plaintiff unpleasantly commenting on certain alleged actions of plaintiff. The Supreme Court held that it was not intended by this act to prohibit a newspaper from publishing the name and portrait in a single issue of a person without his consent having first been obtained; that the act would only apply where there was a continuing publication for purposes of trade. Betts, J., said:

> "If the publication of a portrait can under this statute be prohibited in a daily newspaper, the publication of a name could also be prohibited without such written consent having been first obtained; so that the publiction of a

daily newspaper in this state showing and giving an accurate account of occurrences throughout the civilized world would be an impossibility, as no publishing corporation would undertake to successfully defend the numerous lawsuits that might deluge them if the persons within this state whose names were published (without their written consent) in each issue asserted their rights under this statute. It would seem as if the statement of this proposition ought to bear its own refutation, even without any regard to the infringement of the constitutional guaranty of a free press."

See, also:

Owen v. *Partridge*, 82 N. Y. S., 248.

In *Atkinson* v. *Doherty*, 121 Mich., 372; 80 Am. St. Rep., 507. A cigar manufacturer named cigars "John Atkinson Cigar," for a Michigan lawyer and politician. Injunction was asked. The Supreme Court of Michigan said:

"It is claimed that a man has no right to print and circulate pictures of another except by his consent or where, by reason of his celebrity, the public has an interest in him. This is a proposition of modern origin and is said to have the support of some cases.

We may search the law books published before 1890 in vain for the assertion of any such right as that claimed, or the denial of the right to publish the truth for any lawful purpose and in a decent manner, either orally, in writing or by pictures. What is a picture? It is one of the ways of representing a person or thing. It attempts imitation rather than description. Pictures antedated letters and their use was probably one of the earliest methods of communicating thought and perpetuating events. Pantimime and pictures are intelligible to all pople, while the same cannot be said of written or even spoken language.

> * * * The law does not discriminate between persons who are sensitive and those who are not. The brutality of the remark makes no difference, yet the alleged 'right of privacy' is invaded."

The right was denied.

The Court of Errors and Appeals, in *Vanderbilt* v. *Mitchell*, 67 Atl. Rep., 97 (100), criticises *Robertson* v. *Rochester Folding Box Co.*, and quotes with approval *Pavesich* v. *New England Life Ins. Co.*, *supra*, as does the Court of Chancery of New Jersey in *Edison* v. *Edison Polyform Mfg. Co.*, 67 Atl. Rep., 392. Why they discuss the right of privacy is not clear. Both cases involved property rights, and Mr. Justice Dill in the one, and Vice-Chancellor Stevens in the other, take pains to point out that the decisions rest upon a property right.

The Vanderbilt case was a bill to declare a child illegitimate and cancel certain records alleged to be false and fraudulent, so the child could not participate in a trust estate which upon the death of the complainant, its reputed father, would go to it if legitimate, Mr. Justice Dill, in concluding his opinion, said:

> "Finally, the technical basis of the jurisdiction we are exercising is the protection of property rights."

In the Edison case, the defendant without right was selling a liquid preparation, partly of morphine, and on each bottle a label with Edison's picture and a certificate purporting to have been signed by him as follows:

> "Edison Polyform. I certify that this preparation is compounded according to the formula devised and used by myself.
>
> THOMAS A. EDISON."

Vice-Chancellor Stevens said:

"The Court of Appeals has thus emphatically declared that the term 'property right' is not to be taken in any narrow sense, and the tendency of equity in cases of this description should be to extend, rather than to restrict, the jurisdiction. * * * It is difficult to imagine a case in which preventive relief would be more appropriate than the present. In a perfectly unauthorized way a certificate falsely purporting to be made by Mr. Edison, and false in fact, is put, by a company bearing Edison's name upon every bottle of Polyform which it sells. That there may be no mistake as to who is intended, the certificate is accompanied with a likeness. * * * It is, as the evidence stands, part of the fraudulent contrivance. The abstract question whether a company can innocently use, as a part of its title, the name of a distinguished living character, is not before me for decision, and no opinion is expressed about it."

Why these learned judges considered the so called right of privacy is not clear.

In *Corliss* v. *Walker*, 64 Fed., 280, injunction to restrain the publication of a picture was refused.

COMMENTS OF PROF. FREEMAN, EDITOR AM. ST. REPTS.

In 89 Am. St. Rep., 844, an elaborate note follows *Robertson* v. *Rochester Folding Box Company*, reviewing the cases decided to that date. The conclusion of the reporter is (853):

"There are, we believe, no cases which have not been overruled which sustain the doctrine that damages are recoverable for the mere invasion of a person's right of privacy as such. This necessarily follows if no such right exists. If such right should be held to exist, as is contended for by Judge Gray in his dissenting opinion in the

principal case and by the article in 4 Harvard Law Review, 193, it seems that damages, whether substantial or nominal, would be recoverable in every case. We doubt, however, whether the doctrine of a right of privacy will ever obtain recognition in the absence of legislation to assist it."

To the Pavesich case, 106 Am. St. Rep., 104-133, the only comment by the reporter is "*The Right of Privacy* and the manner of enforcing its recognition are discussed in the monographic note to *Roberson* v. *Rochester Folding Box Co.*, 89 Am. St. Rep., 844-853."

Clearly Prof. Freeman was not impressed by the labored opinion of Mr. Justice Cobb.

Conclusion.

Aside from the *Pavesich* case, every case in which the alleged right of privacy was considered, was an equity case, brought to enjoin the publication of a picture or a writing.

Whether the right to enjoin such a publication will be ultimately established, is not involved in this case. The question here is simply, whether an action at law can be maintained for the invasion of the alleged right of privacy, when no special damages are alleged or proven.

If the advertisement is a libel *per se*, the petitioner is entitled to maintain her action regardless of the alleged right of privacy. If it is not a libel *per se*, then she cannot maintain the action on the ground that her alleged right of privacy has been invaded. Not a single authority has been found sustaining such an action at law. We say this advisedly, for in the *Pavesich* case, the only action at law cited, the court found

that the advertisement was in fact a libel, a conclusion, we think, not supported by authority other than the Georgia code. Nevertheless, a conclusion announced by the court.

In view of the authorities cited, we earnestly insist that the advertisement is not a libel *per se* and that no action will lie for a violation of the alleged right of privacy as such.

We respectfully ask that the judgment of the Court of Appeals of the Seventh Circuit be affirmed.

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